

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



# 76-6082

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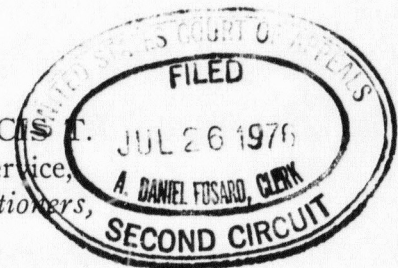
## United States Court of Appeals

FOR THE SECOND CIRCUIT

Index No. 76 C 29

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UNITED STATES OF AMERICA and FRANCIS T.  
BRADY, Special Agent of the Internal Revenue Service,  
*Petitioners,*



—v—  
B & E PAVING COMPANY and JOSEPH BARTONE,  
Partner in B & E PAVING COMPANY,  
Respondent-Appellants.

ON APPEAL FROM UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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### APPENDIX FOR APPELLANT

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BANDLER AND KASS,  
*Attorneys for Respondent-Appellant,*  
*Joseph Bartone*  
605 Third Ave.,  
New York, N. Y. 10016  
(212) 972-1100

*Of Counsel:*

STEPHEN C. SILVERBERG

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76C 207/1	29 76 0029	01 09 76	1	890	1	APPEAL	0715		WEINSTEIN, J.
PLAINTIFFS					DEFENDANTS				

| U.S.A. |

UNITED STATES OF AMERICA and  
FRANCIS T. BRADY, Special Agent  
of the Internal Revenue Service

| B &amp; E PAVING COMPANY, et ano |

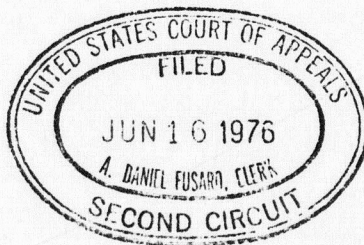
B & E PAVING COMPANY and  
JOSEPH BARTONE, Partner in  
B & E PAVING COMPANY

28 U.S.C. § 2351  
ENFORCEMENT OF INTERNAL REVENUE SUBPOENA

## CAUSE

## ATTORNEYS

For PLAINTIFF:  
U.S. Atty E.D.N.Y.  
By Joel M. Wachs



CHECK HERE	FILING FEES PAID		STATISTICAL CARDS
	DATE	RECEIPT NUMBER	

766

29

U.S.A., et al vs. B &amp; E PAVING COMPANY, et al

DATE	NR.	PROCEEDINGS	
12-2-75		Petition to enforce Internal Revenue Service Summons filed.	(1)
12-2-75		By JUDD, J. - Order to show cause to compel testimony, etc.	
1-9-76	js5	ret 1-9-76 at 9:30 A.M. filed on document #1.	---
		By WEINSTEIN, J. - Case called for hearing on order to show cause. Counsel present. Hearing ordered and begun. Hearing continued to 2-6-76 at 3:30 P.M. - Petitioner has two weeks for briefs.	
1-22-76		Memo. in support of petition to enforce Internal Revenue summons and motion to quash subpoena duces tecum filed.	(2)
2-9-76		Supplemental memo in opposition to petition to enforce IRS summons and in opposition to motion to quash Subpoena Duces Tecum filed.	(3)
2-9-76		Before WEINSTEIN, J. - Case called. Trila ordered and resumed. Motion to enlarge subpoena granted. Oral findings of fact made. Final judgment for govt., Counsel to submit orders relating to enforcement of summons and stay.	
2-23-76		Stenographer's transcript dtd 1-9-76 filed.	(4)
3-5-76		Letter dtd. 3-3-76 from Stephen Silverberg to David McMorro AUSA RE:-extending settlement day of order enforcing summons of IRS 3-9-76 filed.	(5)
3-5-76		By WEINSTEIN, J. - Order dtd. 3-4-76 extending settlement day of order enforcing summons of IRS to 3-9-76 filed on doc. # 5	--
3-11-76		Letter dtd 3-8-76v to J. Weinstein from S. C. Silverberg.	(6)-
3-12-76		By WEINSTEIN, J. - Counter order enforcing Internal Revenue summons dtd 3-11-76 filed. (p/c)	(7)-
3-17-76		Stenographer's transcript dtd 2-6-76 filed.	(8)
5-7-76		NOTICE OF APPEAL FILED.	(9)
5-10-76		Copy of notice of appeal mailed to C of A with copy of docket entries. Copy of notice mailed to U.S. Atty.	===
<del>5-13-76</del>		<del>XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX</del>	
5-13-76		Bond for costs on appeal filed.	(10)
5-26-76		Civil appeal as scheduling order filed.	(11)

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 14, 1976  
BY LEWIS ORGEL, CLERK  
BY [Signature] DEPUTY CLERK

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA and :  
FRANCIS T. BRADY, Special Agent :  
of the Internal Revenue Service, :

Petitioners :

v. :

CIVIL ACTION NO. \_\_\_\_\_

B & E PAVING COMPANY and :  
JOSEPH BARTONE, Partner in :  
B & E PAVING COMPANY, :

PETITION TO ENFORCE INTERNAL  
REVENUE SERVICE SUMMONS

Respondents :

-----X

The United States of America and Francis T. Brady, Special Agent of the Internal Revenue Service, by their attorney, David G. Trager, United States Attorney for the Eastern District of New York, show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 to judicially enforce an Internal Revenue Service summons.

II

The petitioner, Francis T. Brady, is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director of Internal Revenue in New York, New York.

III

The respondents, B & E Paving Company and Joseph Bartone, maintain an office and reside respectively at 3 Diane Lane, East Northport, New York, within the jurisdiction of this Court.

IV

Special Agent Francis T. Brady is conducting an investigation for the purpose of ascertaining the correct tax liabilities of Joseph Bartone for the year 1972 as is set forth in the affidavit of Special Agent Francis T. Brady, attached hereto as Exhibit B.

V

The respondents, B & E Paving Company and Joseph Bartone, are in possession and control of testimony and documents concerning the above-described investigation.

VI

On August 11, 1975, an Internal Revenue Service summons, a copy of which is attached hereto as Exhibit A, was issued by the petitioner, Francis T. Brady, directing the respondents to appear before the said Francis T. Brady, on August 25, 1975, at 10:00 a.m. at 120 Church Street, Third Floor, New York, New York, to testify and to produce for examination books, records and other papers, all of which are fully described in the summons attached hereto as Exhibit A. A copy of this summons was personally served on Joseph Bartone on August 11, 1975 as is set out in the affidavit of the petitioner, Francis T. Brady attached hereto as Exhibit B.

VII

The respondents failed and refused to comply with the summons, and the respondents' refusal to comply with the summons continues to date as is set forth in the affidavit of Francis T. Brady, attached hereto as Exhibit B.

VIII

The information contained in the documents and testimony not produced in accordance with the summons is not in the possession of the petitioners.

IX

It was and now is relevant and essential to the petitioners' investigation to determine the correct tax liabilities of Joseph Bartone for the periods involved that the respondents be required to appear and produce the documents and testimony described in the summons.

WHEREFORE, the petitioners, the United States of America and Francis T. Brady respectfully pray:

1. That this Court enter an order directing the respondents to show cause, if any they have, why they should not comply with and obey the summons attached hereto as Exhibit A in each and every requirement thereof;

2. That this Court enter an order directing the respondents to obey the summons attached hereto as Exhibit A, in each and every requirement thereof by ordering their attendance and production of the records as is required and called for by the terms of the summons before the petitioner, Francis T. Brady, or any other proper officer of the Internal Revenue Service, at such time and place as hereafter may be fixed by the petitioner, Francis T. Brady, or any other proper officer of the Internal Revenue Service, and by ordering the respondents to appear for the purpose of giving testimony concerning the tax liability of Joseph Bartone for the year 1972; and

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3. That this Court grant such other and further relief as it  
deems just and proper.

DAVID G. TRACER  
United States Attorney

By: JOEL M. WICKS  
Assistant United States Attorney

# Summons

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Internal Revenue Service

Box 558 Church St Station  
New York, New York 10008

In the matter of the tax liability of

JOSEPH BARTONE,  
3 Diane Lane, East Northport, New York

Internal Revenue District of Manhattan

Period(s) 1972

The Commissioner of Internal Revenue

To Joseph Bartone, as partner of B & E Paving Co.

At 3 Diane Lane, East Northport, N.Y.

Greetings: You are hereby summoned and required to appear before

Francis T. Brady - Special Agent  
an officer of the Internal Revenue Service, to give

testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

All books, records, documents and papers in your possession or control belonging to B & E Paving Co, which will enable a representative of the Internal Revenue Service to verify the accuracy of the Form 1065 (Partnership) return filed by B & E Paving Co., for the year 1972 including, but not limited to the following:

- |                               |   |
|-------------------------------|---|
| 1. Cash Receipts Journal      | 6. Purchase Invoices  |
| 2. Cash Disbursements Journal | 7. Sales Invoices   |
| 3. Purchase Journal           | 8. Accounts Receivable Subsidiary Ledger                                      |
| 4. Sales Journal              | 9. Accounts Payable Subsidiary Ledger   |
| 5. General Journal            | 10. All bank statements cancelled checks, deposit slips and check book stubs. |

Place and time for appearance:

at 120 Church Street, New York, New York 10008 - 3rd Floor

on the 25<sup>TH</sup> day of August, 19 75 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 11<sup>TH</sup> day of August, 19 75

Original

Signature

Francis T. Brady

Title

Special Agent

Form 2039 (Rev. 2-74)

212-269-2213

EXHIBIT A

# Certificate of Service of Summons

(Present to Section 7603, Internal Revenue Code)

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I certify that I served the summons shown on the front of this form on:

Date

8/11/75

Time

1:55 PM

How  
Summons  
Was  
Served

- ☒ I handed an attested copy of the summons to the person to whom it was directed,

JOSEPH BARTONE

- ☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature

Francis T. Brady

Title

Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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-----x  
UNITED STATES OF AMERICA and :  
FRANCIS T. BRADY, Special Agent :  
of the Internal Revenue Service, :

Petitioners :

v. :

CIVIL ACTION NO. \_\_\_\_\_

B & E PAVING COMPANY and :  
JOSEPH BARTONE, Partner in :  
B & E PAVING COMPANY, :

AFFIDAVIT OF FRANCIS T. BRADY

Respondents  
-----x

STATE OF NEW YORK )  
COUNTY OF KINGS ) SS

FRANCIS T. BRADY, being first duly sworn, deposes and says:

1. He is a Special Agent employed in the Intelligence Division of the Office of the District Director of Internal Revenue at New York, New York.

2. In his capacity as a Special Agent, he is conducting an investigation for the purpose of ascertaining the correct tax liabilities of Joseph Bartone for the year 1972.

3. As part of the above investigation, on August 11, 1975, he issued an Internal Revenue Service summons to B & E Paving Company and Joseph Bartone, directing them to appear before him on August 25, 1975, to testify and to produce for examination the records described in the summons, a copy of which is attached as Exhibit A to these pleadings.

4. On August 11, 1975, an attested copy of the summons described in paragraph 3 above was personally served on the respondent, Joseph Bartone, by personally handing a copy to him.

5. The respondents have failed and refused to comply with the summons, and the respondents' refusal to comply with the summons continues to the date of this affidavit.

6. It is relevant and necessary to examine the books, records and other papers demanded by the summons and to take the testimony of Joseph Bartone in order to ascertain the correct tax liabilities of Joseph Bartone for the year 1972.

7. The information contained in the summonsed documents is not already in the possession of the petitioners.

Francis T. Brady  
FRANCIS T. BRADY  
Affiant

SUBSCRIBED AND SWORN to before me

this 24 day of November, 1975.

Ralph Mahon  
NOTARY PUBLIC in and for said  
State and County.

My Commission expires: March 1977.

Ralph Mahon  
Not. Pub. - State of New York  
No. 24 4501889  
Qual. in Kings County  
Comm. expires March 30, 1977

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA and :  
FRANCIS T. BRADY, Special Agent :  
of the Internal Revenue Service, :

Petitioners :

v. :

CIVIL ACTION NO. \_\_\_\_\_

B & E PAVING COMPANY and :  
JOSEPH BARTONE, Partner in :  
B & E PAVING COMPANY, :

ORDER TO SHOW CAUSE

Respondents  
-----x

Upon the Petition, the Exhibit attached hereto, the Affidavit of Francis T. Brady, Special Agent of the Internal Revenue Service, and upon the motion of David G. Trager, United States Attorney for the Eastern District of New York,

IT IS ORDERED that B & E Paving Company and Joseph Bartone, appear before the District Court of the United States for the Eastern District of New York, in that branch thereof presided over by the undersigned, in his courtroom in the United States Courthouse in Brooklyn, NY on January 9, 1975, at 9:30 a.m., to show cause why they should not be compelled to testify and produce the records demanded in the Internal Revenue Service summons served upon them on August 11, 1975.

LET A COPY OF THIS ORDER, together with the Petition and the Exhibits attached thereto be served upon the respondents on or before November 29 1975.

IT IS FURTHER ORDERED that within 10 days of service of copies of this Order, the Petition and Exhibits upon them, the Respondents shall file and serve a written response to the Petition, supported by appropriate

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Affidavit(s), as well as any Motions the Respondents desire to make. All Motions and issues raised by the pleadings will be considered on the return date of this Order. Only those issues raised in Motion or brought into controversy by the responsive pleadings and supported by Affidavit will be considered at the return of this Order and any uncontested allegation in the Petition will be considered admitted.

IT IS FURTHER ORDERED that Special Agent Francis T. Brady, Internal Revenue Service, is specially appointed to serve this Order, together with the Petition and Exhibits thereto upon the Respondents.

DATED at Brooklyn, New York, this 1st of December, 1975.

/s/ ORRIN G. Judd  
United States District Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA and  
FRANCIS T. BRADY, Special Agent  
of the Internal Revenue Service,

CIVIL ACTION NO.

Petitioners

v.

RESPONSE TO PETITION TO  
ENFORCE INTERNAL REVENUE  
SERVICE SUMMONS

B & E PAVING COMPANY and  
JOSEPH BARTONE, Partner in  
B & E PAVING COMPANY,

Respondents.  
-----x

JOSEPH BARTONE, by his attorneys, Bandler & Kass, as  
his response to the petitioners' petition to enforce Internal  
Revenue Service summons, shows unto this Court as follows:

I

B & E Paving Company is no longer an active business  
and maintains no office, as is set forth in the affidavit of  
Joseph Bartone attached hereto as Exhibit A.

II

Based upon the facts set forth in the affidavit of  
Joseph Bartone, attached hereto as Exhibit A, objection is made

to the aforesaid petition to enforce Internal Revenue Service summons on the following grounds:

1. Respondent denies that the summons was issued in good faith for the purposes alleged in the petitioners' paragraph #IV;
2. Respondent challenges the validity of the summons in question in that said summons was not issued in accordance with the requirements of Section 7602 and governing Court decisions.

III

Based upon the facts set forth in the affidavit of Joseph Bartone, attached hereto as Exhibit A, Joseph Bartone asserts his Fifth Amendment privilege not to produce any records of B & E Paving Company sought pursuant to said summons because said records are deponent's personal records and the production of same may tend to incriminate deponent in a criminal prosecution.

IV

Based upon the facts set forth in the affidavit of Joseph Bartone, attached hereto as Exhibit A., Joseph Bartone

asserts his personal Fifth Amendment privilege against self-incrimination in respectfully refusing to testify as to said books and records or as to his tax liabilities relating thereto.

WHEREFORE, the respondent respectfully prays that this Court dismiss the petition to enforce the Internal Revenue Service summons in all respects and that this Court grant such other and further relief as it decides as just and proper.

BANDLER & KASS

by \_\_\_\_\_  
Robert Sylvor  
A member of the firm

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA and  
FRANCIS T. BRADY, Special Agent  
of the Internal Revenue Service,

:

CIVIL ACTION NO.

Petitioners

:

AFFIDAVIT IN OPPOSITION  
TO PETITION TO ENFORCE  
INTERNAL REVENUE  
SERVICE SUMMONS

v.

B & E PAVING COMPANY and  
JOSEPH BARTONE, Partner in  
B & E PAVING COMPANY,

:

Respondents.

-----x

JOSEPH BARTONE, being duly sworn, deposes and says:

1. He resides at 3 Diane Lane, East Northport, New York.
2. Deponent is the person whose tax liabilities are allegedly being investigated by Special Agent, Francis T. Brady, as stated in affidavit of said Special Agent sworn to on November 24, 1975 and annexed to the Petition to Enforce Internal Revenue Service Summons.
3. Deponent was a partner in B & E Paving Company and as such, deponent is named as a respondent in this proceeding. The partners of B & E Paving Company were myself and Henry Esposito. We operated the partnership ourselves, maintaining

day-to-day supervision of its operations. We were the only signatories on the partnership's checking account. We were both familiar with the accounting and bookkeeping of the partnership and only our efforts produced job orders and income.

4. In paragraph III of said petition the petitioners allege that B & E Paving Company maintains an office at 3 Diane Lane, East Northport, New York. Said allegation is incorrect since B & E Paving Company dissolved in 1972, has carried on substantially no business since that year and maintains no office. Upon the dissolution of B & E Paving Company, deponent assumed all outstanding debts and liabilities of said partnership. In consideration of said assumption of debts and liabilities, deponent obtained personal ownership, possession and control of the books and records of said partnership from deponents former partner.

5. Deponent is now in personal possession and control of any books and records of the former partnership which exist.

6. It is apparent that deponent is a target of a criminal prosecution intended to be instituted by the Department of Justice on behalf of the United States. In a previous proceeding in March, 1975, the Internal Revenue Service sought to

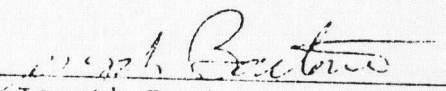
enforce an Internal Revenue Service Summons in this Court for the year 1971. In this proceeding, the Department of Justice was directly involved and its attorney, John J. Tjaden, appeared as Special Attorney for the United States Department of Justice out of its Washington D. C. office, representing the United States of America. The presence of Special Agent Brady in this investigation further indicates that a criminal investigation is being pursued and information is being sought against deponent leading to criminal prosecution. The testimony of Special Agent Brady in his affidavit in support of the present petition, the caption of the Internal Revenue Service summons which is sought to be enforced and the petition itself at paragraph IV indicate that deponent is the sole target of said investigation. The allegation in said petitioner's affidavit is apparently incomplete and misleading in its allegation that Special Agent Brady's purpose in serving said summons was to ascertain deponent's correct tax liabilities. His purpose quite obviously was and is to obtain further evidence in a criminal prosecution against deponent.

7 . Deponent therefore objects to the enforcement of

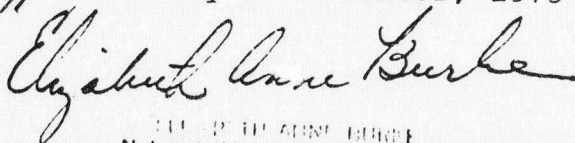
said summons sought by petitioners to be enforced by process of the Court on the grounds that the Internal Revenue Service, in conjunction with the Department of Justice, is seeking to abuse this Court's process in the enforcement of a summons to assist said agencies in its criminal prosecution of deponent.

8. Deponent holds, possesses and controls the records of B & E Paving Company in his personal capacity and not in any representative capacity. Deponent asserts in his personal capacity his Fifth Amendment privilege not to produce any records of B & E Paving Company sought pursuant to said summons, because said records are deponents personal records and the production of same may tend to incriminate deponent in a criminal prosecution.

9. Deponent likewise asserts his personal Fifth Amendment privilege against self-incrimination in respectively refusing to testify as to said books and records or as to his tax liabilities relating thereto.

  
Joseph Bartone

Sworn to before me this  
11<sup>th</sup> day of December, 1975



ELIZABETH ANNE BURKE  
Notary Public, State of New York  
No. 31 5528025  
Qualified in New York County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA and  
FRANCIS T. BRADY, Special Agent  
of the Internal Revenue Service,

Petitioners

v.

AFFIDAVIT

B & E PAVING COMPANY and  
JOSEPH BARTONE, Partner in  
B & E PAVING COMPANY,

Respondents

-----x

State of New York     )  
County of New York    )   ss:

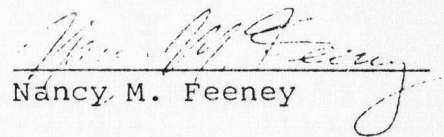
NANCY M. FEENEY, being sworn says: I am not a party  
to the action, am over 18 years of age and reside at  
42-04 Saull St., Flushing, New York.

On December 12, 1975, I served a true copy of the annexed  
Affidavit of Joseph Bartone in Opposition to Petition to Enforce  
Internal Revenue Service summons by mailing the same in a  
sealed envelope, with postage prepaid thereon, in a post-office

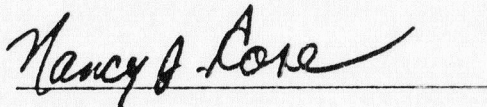
or official depository of the U. S. Postal Service within  
the State of New York, addressed to the last known address  
of the addressee as indicated below:

David G. Trager  
United States Attorney  
U.S. Courthouse  
225 Cadman Plaza East  
Brooklyn, N.Y. 11201

Att: Joel M. Wachs  
Assistant U.S. Attorney

  
Nancy M. Feeney

Sworn to before me on  
December 12, 1975



NANCY J. ROSE  
Notary Public, State of New York  
No. 31-4522612  
Qualified in New York County  
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and  
FRANCIS T. BRADY, Special Agent  
of the Internal Revenue Service,

Petitioners

v.

B & E PAVING CO. and JOSEPH  
BARTONE, Partner in B & E  
PAVING CO.,

Respondents

CIVIL ACTION NO. 76 C 29

COUNTER - ORDER  
ENFORCING INTERNAL REVENUE  
SUMMONS

-----x

This matter having come on for hearing on January 9, 1976 and February 6, 1976, pursuant to an Order directing the respondents, B & E Paving Company and Joseph Bartone, partner in B & E Paving Company, to show cause why they should not be compelled to obey an Internal Revenue Service summons served upon them on August 11, 1975, and the Court having considered the Pleadings, Affidavits and Memoranda of Law submitted by the parties, the testimony and evidence introduced at the hearing, and being otherwise fully advised in the premises thereof, it is

ORDERED, ADJUDGED AND DECREED, that the petition be, and the same hereby is, granted in favor of the petitioner to the extent that the respondents, B & E Paving Company and

Joseph Bartone, comply with the summons served upon them to the extent of providing the records and documents called for and which now exist and are in the possession of the respondent

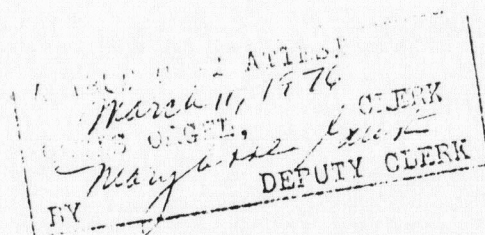
PROVIDED that should the respondents make a timely appeal from this Order, enforcement of this Order shall be stayed, pending the appeal, and final determination thereof only upon the condition that the respondent, Joseph Bartone, execute in the form required by the Internal Revenue Service of the United States an agreement to extend the applicable statutes of limitations with respect to the assessment and collection of income taxes for the year 1972 for a period of time equal to sixty-nine (69) days after the date upon which the determination of the appeal becomes final, and for the year 1971, for a period of time equal to one hundred forty-five (145) days after the date upon which the determination of the appeal becomes final; and further

PROVIDED that the stay of enforcement of this order be also conditioned upon delivery by the respondents to their attorney the records and documents to be produced, or so much of same as exist and are in the possession and control of the respondent for the purpose of preserving and maintaining the

said documents and records in safekeeping, and that counsel for the respondents shall, from time to time, upon the request of the petitioners, give confirmation to the petitioners of the safekeeping of such records as have been delivered to them in the condition in which they are delivered during the pendency of appeal.

DATED at Brooklyn, New York this // day  
of *March*, 1976.

Jack B. Weinstein  
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
-----

UNITED STATES OF AMERICA, and  
FRANCIS T. BRADY, Special Agent of  
the Internal Revenue Service,

Petitioners

Civil Action No. 76C29

NOTICE OF APPEAL

v.

B & E PAVING CO. and  
JOSEPH BARTONE, Partner in  
B & E PAVING CO.,

Respondents  
-----

Notice is hereby given that B & E PAVING CO. and JOSEPH BARTONE, respondents above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from a final order compelling B & E PAVING CO. and JOSEPH BARTONE to comply with the summons served upon them by Petitioner, Francis T. Brady, Special Agent, to the extent of providing the records and documents called for by said summons, which now exist and are in the possession of the Respondent, which order was entered in this action on the 11th day of March, 1976.

Dated: May 4 1976

BANDLER & KASS

By: 

William C. Sherr  
A Member of the Firm  
Attorneys for Appellants  
B & E Paving Co. and Joseph  
Bartone

To: David G. Trager  
United States Attorney  
U.S. Courthouse  
225 Cadman Plaza East  
Brooklyn, N.Y. 11201

Att: Joel M. Wachs  
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA and :  
F.T. BRADY, SPECIAL AGENT OF :  
THE INTERNAL REVENUE SERVICE, :

Plaintiffs, :

-against- :

B.&E. PAVING COMPANY and :  
JOSEPH BARTONE, :

Defendants. :

-----x

United States Courthouse  
Brooklyn, New York

January 9, 1976  
9:30 o'clock A.M.

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

ILENE GINSBERG  
OFFICIAL COURT REPORTER

## Appearances:

DAVID G. TRAGER, ESQ.  
United States Attorney  
for the Eastern District of New York  
Attorney for Plaintiffs  
BY: JOHN R. TJADEN, ESQ.  
Assistant U.S. Attorney

MESSRS. BANDLER & KASS  
BY: STEPHEN C. SILVERBERG, ESQ.  
Attorney for Defendants

1  
2 THE CLERK: Civil motion, U.S.A. and F.T. Brady,  
3 Special Agent of the IRS v. B&E Paving Company and  
4 Joseph Bartone.

5 THE COURT: Go ahead.

6 MR. TJADEN: Your Honor, this matter involves  
7 the request of the Government for enforcement of a  
8 summons, Internal Revenue Service administrative  
9 summons issued by one of the petitioners here, Special  
10 Agent Francis Brady.

11 THE COURT: Do we have a number?

12 MR. TJADEN: There has been no number assigned  
13 to this.

14 THE COURT: Tell the Clerk to assign a civil  
15 number to it. Treat it as a civil case and assign a  
16 number to it.

17 THE CLERK: Yes, Judge.

18 MR. TJADEN: The factual circumstances surround-  
19 ing the issuance of the summons, I believe, are not  
20 really in dispute and the question would involve the  
21 defense that has been raised on the part of the  
22 Respondent as to why he should not be required to  
23 comply with the summons.

24 The basic facts, as I understand them, are that  
25 Special Agent Brady has been assigned the tax liability

1 of the respondent in this case, Joseph Bartone, who  
2 happens to be or was a partner at one time of B&E  
3 Paving Company.

4 During the course of his investigation, Special  
5 Agent Brady came to issue a summons to Mr. Bartone  
6 as the partner and person in control and custody of the  
7 records, to inspect and copy those records.

8 Mr. Bartone has now declined to comply with the  
9 summons asserting that his Fifth Amendment privilege  
10 passes to those records and thus precludes the  
11 requirement that he provide them to the Government.  
12 That's where we are today.

13 THE COURT: Yes, I understand.

14 As I understand it, there are two issues before  
15 me: one, whether this is in fact an attempt to get  
16 material for a civil liability or whether they have  
17 already determined to go ahead criminally and it is  
18 really an attempt to utilize the procedures to obtain  
19 information for a criminal prosecution and second,  
20 whether privilege against self-incrimination applies  
21 to these documents because they are, for our purposes,  
22 those of the partner, Joseph Bartone, or whether they  
23 are partnership documents, those documents have a  
24 separate entity and therefore are not within the  
25 protection of the privilege.

1 Is that correct?

2 MR. TJADEN: That would be the essence of the  
3 case as far as I am concerned.

4 MR. SILVERBERG: The statement your Honor made  
5 is accurate. I would just like to state that there are  
6 various aspects of the attack on the summons with  
7 regard to the proper purpose of the investigation, the  
8 good faith in which it was issued, and the status in  
9 the investigation and of any recommendations for  
10 prosecution. There are various aspects the cases hold,  
11 that are separately considered.

12 THE COURT: That really boils down to the  
13 question of whether they decide to go ahead criminally  
14 or whether in good faith they are merely proceeding  
15 in order to collect the civil liability.

16 MR. SILVERBERG: Yes.

17 THE COURT: If the Government wishes to put on  
18 the first witness --

19 MR. TJADEN: We submitted a petition, filed a  
20 petition, and I attempted to outline the essential facts.  
21 They have not been disputed or denied by the  
22 Respondent and I believe they should be deemed as  
23 being admitted -- that Mr. Brady is a Special Agent  
24 conducting an investigation as I described and that he  
25 issued and served the summons on Mr. Bartone and

1 Mr. Bartone has declined to provide the material.

2 MR. SILVERBERG: No.

3 Paragraph 4 states that he is issuing a summons to  
4 get tax information for a civil liability.

5 THE COURT: I understand that but he has issued  
6 the summons and delivered the summons ---

7 MR. SILVERBERG: Yes. Counsel stated it was for  
8 civil purposes.

9 THE COURT: I understand that is contested.

10 MR. TJADEN: We would submit that the applicable  
11 law is that there must be some civil aspect to his  
12 investigation. There can be a criminal aspect  
13 simultaneously as the Supreme Court held in Donaldson  
14 which I understand the Court is familiar with. So  
15 what we really should seek is whether there was any  
16 civil aspect to this investigation to justify the  
17 issuance and enforcement of the summons.

18 THE COURT: Why don't you go ahead with the  
19 testimony and we will take the argument later.

20 MR. TJADEN: I call Francis Brady.  
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2 FRANCIS BRADY, called as a witness,  
3 having been first duly sworn by the Clerk of the Court,  
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. TJADIN:

7 Q Mr. Brady, by whom are you employed?

8 A By the Internal Revenue Service.

9 Q In what capacity?

10 A As a Special Agent.

11 Q And to what office are you attached?

12 A The Manhattan District, 120 Church St., New  
13 York City.

14 Q And as a Special Agent do you have authorization  
15 to issue and serve affidavits, summonses for documents and  
16 testimony?

17 A Yes.

18 Q Does an aspect of your official duties involve  
19 the ascertaining of the correct tax liability of taxpayers  
20 whose cases are assigned to you?

21 A Yes, it does.

22 Q In your capacity as a Special Agent were you  
23 assigned to investigate the tax liabilities of Joseph Bartone?

24 A Yes.

25 Q What was the purpose of your examination then?

1  
2 A The purpose of the investigation is to  
3 determine his correct tax liability.

4 MR. TJADEN: Your Honor, with my understanding  
5 that all other elements of the Government's case have  
6 been conceded I have no further questions at this time.

7 THE COURT: Any cross-examination?

8 MR. SILVERBERG: Yes, your Honor.

9 THE COURT: You may.

10 CROSS-EXAMINATION

11 BY MR. SILVERBERG:

12 Q Mr. Brady, you stated you are an employee of  
13 Internal Revenue Service. What division of Internal Revenue  
14 Service?

15 A The Intelligence Division.

16 Q And as far as you understand the role of the  
17 Intelligence Division what is the purpose of the Intelligence  
18 Division?

19 A The mission of the Intelligence Division is to  
20 encourage the voluntary compliance to the tax laws.

21 Q Would it be correct to state that the role of  
22 the Intelligence Division is also to investigate criminal  
23 aspects of violations of the tax law?

24 A That is one of the responsibilities. One of  
25 the responsibilities would be to investigate possible criminal

1  
2 violations.

3 Q How would you distinguish the normal audit  
4 function of the Internal Revenue Service from the Intelligence  
5 Division --

6 MR. TJADEN: If you know.

7 It has been established that he is in the  
8 Intelligence Division and not the Audit Division.

9 MR. SILVERBERG: I assume if he knows his role  
10 he may know the role of the normal revenue agent.

11 MR. TJADEN: Can you answer his question?

12 A The Audit Division, as I understand it, would  
13 conduct civil audits and make recommendations as to taxes  
14 involving civil matters and not criminal matters.

15 Q And at what stage would you be involved in a  
16 case?

17 A Well, in a situation that a recommendation of  
18 possible fraud is made, it is then referred to the Intelligence  
19 Division from the Audit Division.

20 Q And how in fact, in this case, did you become  
21 involved -- well, basically, about what date were you assigned  
22 this case?

23 A I was assigned this investigation in May of 1975.

24 Q And you have been proceeding on this investigation  
25 since then; is that correct?

Brady-cross

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1  
2 A Yes. This is not the only investigation I have  
3 conducted since that time.

4 Q We understand that. You must be very busy.  
5 When this case was assigned to you what was  
6 stated to be the purpose of the investigation by your superiors?

7 A Objection. It is not relevant.

8 THE COURT: Overruled.

9 A The purpose is never discussed with my superiors.

10 Q Well, were you given an assignment sheet or an  
11 assignment document of any type or did someone just say,  
12 "Investigate Joe Bartone"?

13 A There is an assignment card when an  
14 investigation is referred to the Intelligence Division.

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16 (continued next page)  
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Brady-cross

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2 MR. SILVERBERG: Let me bring up at this point,  
3 your Honor, that on January 7 I served upon Special  
4 Agent Brady a subpoena duces tecum to produce --

5 THE COURT: Mark it in evidence.

6 THE CLERK: Defendant's Exhibit A.

7 (So marked.)

8 THE COURT: In evidence.

9 THE CLERK: Marked in evidence.

10 (So marked.)

11 THE COURT: Yes.

12 MR. SILVERBERG (Continuing) -- to produce  
13 documents, reports, correspondence and memorandum of  
14 communications in connection with any criminal liability  
15 or recommendation for criminal prosecution of Joseph  
16 Bartone.

17 I'd like at this time to have an opportunity to  
18 examine those documents.

19 MR. TJADEN: We would, of course, your Honor,  
20 oppose the subpoena and move to have it quashed on  
21 several grounds, if I might be entitled to state those  
22 grounds.

23 THE COURT: Yes?

24 MR. TJADEN: To begin with, the language of the  
25 summons itself is very vague and indefinite. It is

Brady-cross

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1  
2 lacking in specificity.

3 THE COURT: Just to be particular, do you have  
4 this card of assignment?

5 MR. TJADEN: (Addressing witness) Do you have the  
6 card of assignment that was referred to?

7 THE WITNESS: Yes.

8 THE COURT: Let's see it. Produce it.

9 MR. TJADEN: Are you ordering that it be  
10 produced for examination?

11 THE COURT: Examination by me so I will see  
12 what the thing is all about. I think it is specific  
13 enough to produce that.

14 What are your other grounds?

15 MR. TJADEN: The language of the summons asks  
16 for any and all documents --

17 MR. SILVERBERG: You have to read the rest of  
18 the sentence.

19 MR. TJADEN: Any and all documents, reports,  
20 communications in respect of the criminal liability or  
21 recommendations for criminal prosecution of Joseph  
22 Bartone.

23 THE COURT: That is vagueness again.

24 What is your other point?

25 MR. TJADEN: We don't know what he is seeking

Brady-cross

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1  
2 unless he is seeking everything and anything --

3 THE COURT: Is there any objection to this?

4 MR. TJADEN: Yes. It is not relevant before the  
5 Court as to the enforceability of the summons issued  
6 by Special Agent Brady.

7 THE COURT: (Addressing witness) Show it to the  
8 attorney for the Government and he will turn it over to  
9 me and I will mark it for identification as a Government  
10 exhibit while I inspect it in camera.

11 (Document handed to Government counsel and then  
12 to Court.)

13 THE COURT: Thank you.

14 (Pause)

15 THE COURT: There is another possible ground it  
16 contains information that relates to a pending  
17 investigation --

18 MR. TJADEN: That is correct, your Honor --

19 THE COURT: (Continuing) -- that ought not to be  
20 revealed. On that ground --

21 THE CLERK: Document marked as Government  
22 Exhibit 1 for identification.

23 (So marked.)

24 THE COURT: (Continuing) I will not show it to  
25 counsel for the taxpayer.

Brady-cross

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1  
2 However, I will read the portions of it which  
3 are relevant to this inquiry.

4 It says, "Name and address: Bartone, Joseph;  
5 3 Diane Lane, East Northport, New York. Occupation:  
6 partner, B&E Paving Company. Allegation: Unreported  
7 business income. Years involved: 1971. Date info  
8 items received: 4/17/75."

9 I take it that means by your Division?

10 THE WITNESS: Yes, your Honor.

11 THE COURT: "Assigned to Group A2 by Digricoli,  
12 D.P. Digricoli. Date: 5/2/75." Signed by "Agent  
13 Brady" and what appears to be, "F-e-r-r-i-s-e" -- is  
14 that?

15 THE WITNESS: Yes.

16 THE COURT: "750379C" and "Date issued, it has  
17 North Atlantic Region, Manhattan District."

18 There are unfilled sections of the form which  
19 is an NAR form 4-7(3 -65), assignment and completion  
20 record numbered case, it's stamped "SF" and under  
21 "recommendations" under the column "closing action"  
22 there are check boxes; "prosecution, non-prosecution"  
23 and "withdrawal; additional tax penalties, fraud,  
24 others" and the total.

25 There is a check box "declined by ARC-I, (non-

Brady-cross

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1  
2 pros)."

3 On the back of the form there is space for use  
4 follow-up at various intervals.

5 I will not read that portion pertaining to  
6 investigation.

7 Is there anything else? Do you have a likeness --

8 THE WITNESS: This is a copy of it, your Honor  
9 (indicating).

10 MR. SILVERBERG: If I may ask your Honor, the  
11 reference you make to investigation, is that of the  
12 Respondent or another party?

13 THE COURT: Another party.

14 MR. SILVERBERG: If you want to mask it out --  
15 but I'd like to see the document.

16 THE COURT: I don't think it is necessary.

17 BY MR. SILVERBERG:

18 Q Mr. Brady, could you explain what the last  
19 designation read by the Court was, "ARC-I(non pros)" -- what  
20 does that mean?

21 THE COURT: That hasn't been checked. That is  
22 just a choice. That is all blank.

23 MR. SILVERBERG: I'm sorry. I thought your  
24 Honor said it was checked.

25 THE COURT: No, none of it is checked. It is

Brady-cross

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1  
2 apparently the blank form with the initial recommenda-  
3 tions.

4 A That would refer to, "declined by Assistant  
5 Regional Commissioner-Intelligence" and in parentheses, "non-  
6 pros"; non-prosecution.

7 Q But that hasn't been checked?

8 A No.

9 Q Have any of the boxes been checked?

10 MR. TJADEN: Objection.

11 THE COURT: I will allow it.

12 MR. SILVERBERG: It's extremely relevant.

13 THE COURT: Yes.

14 A None of the boxes have been checked.

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16 (continued next page)  
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Brady-cross

BY MR. SILVERBERG:

Q In the normal course when would those boxes be checked?

A When a case would be closed.

Q Closed. And would that card follow the case through the Internal Revenue Service procedure?

A This card -- after a Special Agent would write his report and it was reviewed and then the case would be forwarded through channels within the Internal Revenue Service -- this card would be completed at that time and go forward.

Q At what stage would that be?

A That would be after the Special Agent had made his recommendations and the report was written and reviewed and was forwarded within the Intelligence Division if it were being forwarded, for example, for further review.

Q That would be when it is down in Washington?

A No.

Q If the case had proceeded through normal channels then the final action would be taken in Washington, wouldn't it -- who would check those boxes?

A These boxes would normally be completed by the Group Manager.

Q At what office?

A In the Intelligence Division.

2

1

2

Q Where?

3

A In this particular situation in the Manhattan

4

District.

5

Q I'm trying to understand when it would be

6

completed.

7

A The boxes would be completed. Then it would be

8

checked at that time.

9

Q Would this be before it is referred to the

10

Regional Commissioner?

11

A Yes.

12

Q Would it be completed before you complete your

13

report?

14

A No.

15

Q Is this the only card on this case in existence?

16

A There are copies of this card but, you know, it

17

would be the same information on the card.

18

Q Would any card be the card to be checked and not

19

that card?

20

A No. This particular card would be and is

21

maintained in the Intelligence Division files -- this

22

particular card.

23

Q Where are the other cards kept?

24

A There is one card that is given to the Special

25

Agent and one card goes to the Group Manager and those are the

Brady-cross

cards that I am familiar with.

Q So, you say that you received this case in May of 1975; is that correct?

A That is correct.

Q And you proceeded to perform your duties; is that correct?

A Yes, sir.

Q With regard to this case?

A Yes, sir.

Q Approximately how many people have you spoken to regarding this case?

MR. TJADEN: Objection.

THE COURT: Sustained.

MR. SILVERBERG: Your Honor, I asked the question because I am advised that Agent Brady and another agent who I tried to obtain the name of, have gone through practically every customer of Respondent, have examined relatives of the Respondent at length, have gone to people who never had any knowledge of the Respondent and as a result of this tremendous effort the Respondent is losing his livelihood and I'd like to know approximately how many people he has gone to in this case.

MR. TJADEN: It has no bearing on this summons.

Brady-cross

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4 1  
2 MR. SILVERBERG: It has, as to the harassment  
3 of the Respondent.

4 THE COURT: The issue is whether it is civil or  
5 criminal in nature.

6 MR. SILVERBERG: The cases state, including  
7 Powell that the question is one of good faith and  
8 whether the investigation, whether it is taken in good  
9 faith or for harassment purposes.

10 MR. TJADEN: I submit again it is not submitted  
11 as an issue --

12 MR. SILVERBERG: It has been raised.

13 THE COURT: I will permit it to be raised now.  
14 I will permit the question. It may bear on whether  
15 this is in fact a civil or criminal prosecution. I  
16 will accept the question.

17 MR. TJADEN: As I understand the question, he  
18 is asking the agent how many people he has spoken to --

19 THE COURT: In connection with this  
20 investigation.

21 He is asking how many witnesses has he or his  
22 associates seen in connect6on with the investigation.

23 You may answer.

24 A I'd have to estimate that at approximately 50  
25 people.

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O Fifty people?

A Yes.

O About how many of those people would be prior customers or customers of B&E Paving?

MR. TJADEN: Objection. We are getting into the results of the investigation now.

MR. SILVERBERG: I think it is a proper question.

MR. TJADEN: He is not entitled to that information.

THE COURT: I think we have sufficient for this purpose for me to make a judgment on this.

You may inquire on other matters on this matter if you wish.

Q Have you spoken to the niece of the Respondent?

MR. TJADEN: Objection.

THE COURT: Sustained.

Q Have you spoken to Pan American --

MR. TJADEN: Objection.

THE COURT: Are they a former customer?

MR. SILVERBERG: A former customer. They are no longer a customer of the Respondent's.

THE COURT: Pan American Airlines?

MR. SILVERBERG: Pan American Airlines and they

1  
2 dropped relations because of two visits by the IRS in  
3 investigating this situation.

4 MR. TJADEN: I move to strike the remarks of  
5 Mr. Silverberg.

6 THE COURT: I don't take them as evidence, just  
7 statements helping me to determine relevance.

8 MR. TJADEN; I don't see how they would be  
9 relevant based on what Mr. Silverberg says because the  
10 affidavit by Mr. Bartone states he is out of business.

11 MR. SILVERBERG: His subsequent businesses are  
12 being terminated.

13 THE COURT: I will sustain it.

14 Go ahead, next.

15 I will take your client's hearsay on it.

16 However, if you want to put him on the witness stand --

17 MR. SILVERBERG: We would have difficulty with  
18 that.

19 Q Likewise, have you spoken to St. John's  
20 Hospital --

21 MR. TJADEN: Objection.

22 THE COURT: Sustained.

23 How many clients did B&E have?

24 MR. SILVERBERG: How many?

25 THE COURT: Yes.

Brady-cross

MR. SILVERBERG: I don't think --

THE COURT: You don't want to answer that because of -- I see.

MR. SILVERBERG: Yes, your Honor.

THE COURT: (Addressing witness) How many clients did they have?

THE WITNESS: I don't know, your Honor.

THE COURT: How many do you think they had based on your investigation?

THE WITNESS: I would say the majority of the people that we interviewed, of the fifty people I mentioned, I would estimate thirty-five of those people would be former customers.

THE COURT: So, most of the people you interviewed are former customers or people you believed to be former customers?

THE WITNESS: Yes, your Honor.

CROSS-EXAMINATION

BY MR. SILVERBERG (Cont.):

Q Did you also interview neighbors of the Respondent?

MR. TJADEN: Objection.

Even if he were required to answer yes or no it has no probative value.

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Brady-cross

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THE COURT: Well, it has some bearing on whether--

3

MR. TJADEN: I don't think the Respondent is

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entitled to use this form as a discovery device.

5

THE COURT: I agree with you and I will be strict

6

in limiting it but I take it, in any event, this kind

7

of investigation would be normal to determine life-

8

style or whether he paid his taxes.

9

It is no indication of a criminal investigation

10

to look at the man's lifestyle.

11

Q When you interviewed these clients or neighbors

12

or relatives, how did you introduce yourself, how did you

13

introduce the purpose of your visit?

14

MR. TJADEN: Objection.

15

THE COURT: No. I will permit that.

16

A I introduced myself as a Special Agent of the

17

Internal Revenue Service.

18

Q Did you just introduce yourself or did you state

19

the purpose of your visit?

20

A Yes.

21

Q How did you state the purpose of your visit?

22

MR. TJADEN: Objection.

23

THE COURT: I will permit it. He is not

24

revealing anything. If he interviewed neighbors I am

25

sure the taxpayer knows about it. He is just informing

1  
2 me.

3 A I said that there was a tax investigation of  
4 Joseph Bartone being conducted.

5 Q Did you say by whom it was being conducted?

6 A By the Internal Revenue Service.

7 Q Did you say it was by the Intelligence Division  
8 or by audit?

9 A I may have said Intelligence Division in  
10 individual cases.

11 Q Did you say that the purpose of the investiga-  
12 tion was criminal in nature?

13 A I may have stated that there was a possible  
14 criminal violation, a possible criminal situation.

15 Q And in the course of your interviews, did you  
16 make reports of your interviews?

17 A I took notes.

18 Q Were they subsequently formalized in written  
19 reports?

20 A No.

21 MR. SILVERBERG: I'd like an opportunity to  
22 examine those reports.

23 MR. TJADEN: He doesn't call for anything.  
24 First of all, the witness stated he hasn't reduced them  
25 to reports.

10

Brady-cross

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1 MR. SILVERBERG: Then the notes.

2  
3 MR. TJADEN: They are not called for in the  
4 subpoena.

5 THE COURT: Do you object?

6 MR. TJADEN: Very definitely.

7 MR. SILVERBERG: These are work products.

8 THE COURT: Sustained.

9 I am not going to give you information from an  
10 investigation when a recommendation has not been made  
11 and it is an ongoing investigation.

12 Q Have you prepared any contemporary memoranda of  
13 the findings?

14 A No.

15 Q Have you made any conclusions regarding your  
16 investigation?

17 A No.

18 Q You are stating that from May to January you  
19 have made no conclusions as to your investigation?

20 A Yes.

21 Q Have you spoken to your superiors regarding this  
22 investigation?

23 A Yes.

24 O Have you made reports to your superiors  
25 regarding this investigation?

Brady-cross

1  
2 A I have spoken with them.

3 By reports -- written reports?

4 Q Progress reports, status reports.

5 A Yes.

6 MR. SILVERBERG: I'd like an opportunity to  
7 examine those reports. I think they are very relevant  
8 as to whether or not Agent Brady has in his mind  
9 determined whether this is a criminal investigation  
10 and under applicable cases and construing Donaldson,  
11 if the investigation of the Special Agent has taken on  
12 criminal overtones then the issue of the good faith  
13 with which the summons was issued is brought into  
14 question.

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Brady-cross

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2 MR. TJADEN: The Government, of course, objects  
3 to disclosure or production of any of the document,  
4 called for by counsel.

5 THE COURT: Has the Government submitted a brief?

6 MR. TJADEN: I have just received a copy of the  
7 Respondent's answer and memorandum on Tuesday of this  
8 week.

9 THE COURT: I am not being critical. I am ask-  
10 ing a question of fact.

11 MR. TJADEN: The answer is no, we have not.

12 THE COURT: It would have been helpful if I  
13 could have read your case as well as theirs last night.

14 MR. TJADEN: Well, we received the subpoena --

15 MR. SILVERBERG: I spoke to you and advised you  
16 that I was serving it. There was no formal motion  
17 to quash the subpoena. It is being raised here.

18 THE COURT: You are from Washington, aren't you?

19 MR. TJADEN: Yes.

20 THE COURT: Don't they have form briefs on all  
21 this? Is this the first time that anything like this  
22 happened in the United States?

23 MR. TJADEN: A subpoena for documents like this?

24 THE COURT: Yes.

25 MR. TJADEN: No, it's not.

Brady-cross

29

1 THE COURT: You must have plenty of briefs.

2 MR. TJADEN: No, we do not.

3 MR. SILVERBERG: There is a case on appeal in  
4 the District of Columbia.

5 THE COURT: This seems like a difficult case.

6 MR. TJADEN: They are seeking an investigative  
7 file.

8 THE COURT: They may be entitled to it. I don't  
9 know the law in this area.

10 MR. TJADEN: It is a well-established principle --

11 THE COURT: Well, when will I get a brief?

12 MR. TJADEN: Ten days.

13 THE COURT: I cannot proceed.

14 MR. SILVERBERG: The whole crux of our objection  
15 is that it is bad faith and if there is a desire to  
16 proceed criminally it raises the whole question of  
17 good faith.

18 MR. TJADEN: Well, the Respondent has to show  
19 some abuse --

20 MR. SILVERBERG: I can't do it --

21 THE COURT: He can't do it and I won't guess at  
22 law I don't know. I must have the briefs.

23 BY MR. SILVERBERG:

24 Q Have you made any determination as to criminal  
25

1  
2 liability of the Respondent?

3 A No.

4 Q Have you discussed this case with the Regional  
5 Commissioner's Office?

6 A No.

7 Q Have you discussed this case with Washington,  
8 the Department of Justice?

9 A No. The only discussions with either of those  
10 offices would be relevant to the summons enforcement.

11 MR. SILVERBERG: I am at a loss to proceed on  
12 this point without the actual documents.

13 Under normal circumstances, the Department of  
14 Justice is involved in a case at the criminal level of  
15 a tax investigation.

16 Mr. Tjaden is from the Department of Justice in  
17 Washington. Usually, it is left to the Assistant U.S.  
18 Attorney in the locality where the District Court is  
19 located if it is a normal civil investigation.

20 THE COURT: Is that true? I don't know.

21 MR. TJADEN: No, it's not.

22 MR. SILVERBERG: From my research on the  
23 question, Mr. Tjaden's presence from Washington, from  
24 the Department of Justice, raises a question of the  
25 status of this investigation.

Brady-cross

31

1  
2 MR. TJADEN: That's totally inaccurate in that  
3 the Department of Justice, the Tax Division of which I  
4 am a member, is charged with handling all summons  
5 enforcement matters.

6 MR. SILVERBERG: If you give me a minute --

7 MR. TJADEN: Of course, the U.S. Attorney's  
8 Office is within the Department of Justice itself.

9 MR. SILVERBERG: If you give me five minutes I  
10 will show you where there is no Department of Justice  
11 representation in summons enforcement cases including  
12 Court of Appeals cases.

13 THE COURT: I must say that this isn't helpful.  
14 I must have briefs.

15 I am going to have to put off further hearing  
16 on the first issue. Let's move to the second issue,  
17 the taxpayer's relationship and nature of the  
18 partnership.

19 MR. SILVERBERG: Do I assume my cross-examination  
20 of the witness is suspended?

21 THE COURT: Yes, unless you'd like to go forward.  
22 I take it you cannot.

23 MR. SILVERBERG: We cannot go forward in our  
24 allegation until we have some ruling on the documents.

25 THE COURT: We will suspend on that.

Brady-cross

32

1  
2 Let's move on to the second issue.

3 MR. TJADEN: May the witness step down then.

4 THE COURT: Yes.

5 MR. SILVERBERG: Your Honor, insofar as the  
6 Respondent's assertion of his Fifth Amendment  
7 privilege is concerned, we are in a bit of a dilemma  
8 as you can understand.

9 When a party asserts his Fifth Amendment  
10 privileges he is in a position of attempting to justify  
11 to the Court that he has substantial reason to believe  
12 that he is under criminal investigation and that  
13 whatever evidence he may produce or testify to may  
14 incriminate him in a criminal prosecution.

15 I believe that the response and the affidavit  
16 of the Respondent which was filed with this Court is  
17 sufficient to lay the groundwork for his assertion of  
18 Fifth Amendment privileges as far as his testimony is  
19 concerned at least and also as far --

20 THE COURT: I don't know anything about this  
21 partnership. It could be doing all kinds of business.

22 MR. SILVERBERG: In the Respondent's affidavit  
23 it is stated that B&E Paving Company is no longer in  
24 business.

25 THE COURT: I understand that but that doesn't

1 help us. The question is, what kind of a relationship  
2 was there before it went out of business?

3 MR. SILVERBERG: I think that is also stated in  
4 the affidavit -- that it was a two-man partnership, it  
5 was in existence for perhaps two years. It was  
6 dissolved and upon dissolution there were enormous  
7 debts and as part of the dissolution the Respondent  
8 agreed to pay these liabilities and retained papers  
9 and books and records and retained absolute ownership.

10 THE COURT: Is the partnership agreement and  
11 dissolution agreement available?

12 MR. SILVERBERG: I believe what the Respondent  
13 believes to be a document of a partnership was filed  
14 with the County Clerk in Queens.

15 THE COURT: Then there should be no objection to  
16 furnishing a copy. I would like to look at it to  
17 determine what the nature of the business is.

18 What about the dissolution agreement? Was that  
19 filed?

20 MR. SILVERBERG: Was there anything in writing  
21 when B&E dissolved?

22 MR. BARTONE: I don't think so.

23 MR. SILVERBERG: The Court should understand  
24 that was the loosest kind of business venture.

25 THE COURT: That's what you say but you were not

1 there and neither was I and I have no evidence one way  
2 or another on it except the affidavit of the Respondent.

3 MR. TJADEN: With respect to that affidavit.  
4 Mr. Bartone is obviously present today and I would move  
5 to strike the affidavit from being admitted as evidence  
6 today.

7 MR. SILVERBERG: On what ground?

8 THE COURT: Well, it's not evidence but it is  
9 available on the motion.

10 Are you putting forward any evidence at all?

11 MR. SILVERBERG: As I said, I believe the  
12 affidavit is sufficient.

13 If the Court desires the Respondent to testify --

14 THE COURT: I have no desire. I am not going to  
15 tell you what to do.

16 I understand your dilemma. You decide what you  
17 want to do. I am just here to judge the case.

18 MR. SILVERBERG: I would permit the Respondent  
19 to testify regarding the foundation for his assertion  
20 of his Fifth Amendment privilege if it is understood  
21 by counsel for the Government and stated on the record  
22 that the testimony and its fruits would not be used in  
23 any proceeding against the Respondent.

24 MR. TJADEN: I cannot agree to that.

25 MR. SILVERBERG: To further substantiate the

1 privilege the Respondent is faced with the dilemma of  
2 waiving his privilege.

3 THE COURT: Is the former partner still available  
4 or alive?

5 MR. SILVERBERG: Still alive but oddly, as I  
6 understand, not the subject of an investigation.;

7 THE COURT: How old is he?

8 MR. SILVERBERG: 45 or --

9 MR. BARTONE: 48.

10 MR. SILVERBERG: As I understand, he was ill at  
11 the beginning of the investigation.

12 THE COURT: You can call him without waiving  
13 your client's privilege.

14 MR. SILVERBERG: Well, I didn't understand that  
15 he was still available. Last time in court on a 1971  
16 tax year he was unavailable.

17 If your Honor would adjourn the case until we  
18 get a disposition of the remaining issues --

19 MR. TJADEN: Your Honor, they had an opportunity  
20 today to present the witnesses they desired, whether  
21 neighbors, former customers --

22 THE COURT: I am not going to cut them off.

23 I find it a very puzzling case on all the issues.

24 I think we will have to adjourn.

25 I myself would have tended to treat the

1 partnership and partnership books as non-privileged  
2 and let it go. But obviously, the cases go the other  
3 way.

4 The Slutsky case is a very strong case where  
5 there were over four million dollars in assets in a  
6 partnership and Slutsky was cited by the United States  
7 Supreme Court as a leading case.

8 I must say I could not understand Slutsky myself.

9 MR. TJADEN: As your Honor alluded to the Bellas  
10 case in referring to the Slutsky decision, we of course  
11 are submitting that it is not analogous to the present  
12 case. There is no family relationship between them.

13 MR. SILVERBERG: I don't think the fact that the  
14 partners were not brothers would be controlling if all  
15 other facts are so strongly similar to Slutsky.

16 MR. TJADEN: But we have no other facts --

17 THE COURT: That's the difficulty. I just don't  
18 know what to say about this case. I have never been in  
19 so much of a quandary because I have not received the  
20 briefs from the Government. So I don't know what the  
21 Government's legal position really is.

22 MR. SILVERBERG: We are in a quandary, too,  
23 because to go into day-to-day operations opens up the  
24 whole issue which privilege is being asserted and the  
25 Government does not concede that exploring any further

1 facts would be barred from use.

2 MR. TJADEN: Let me clarify my point for that  
3 on the record.

4 When I say I cannot agree it is primarily  
5 because I don't have authority to agree.

6 THE COURT: Well, why don't you go back and see  
7 what your authority is and submit a couple of briefs or  
8 a brief and perhaps then we can go forward with this  
9 hearing.

10 In the meantime, I am not going to require the  
11 defendant or rather the taxpayer to respond to this  
12 summons. I am going to stay it.

13 MR. TJADEN: Will this case be re-set for a  
14 hearing?

15 THE COURT: I will set another hearing date if  
16 you'd like. When do you want it?

17 MR. TJADEN: I'd like time to brief it but of  
18 course as soon as we can.

19 THE COURT: When can you brief it?

20 MR. TJADEN: Two weeks.

21 THE COURT: He'll require another week to  
22 respond.

23 MR. TJADEN: Early February.

24 MR. SILVERBERG: I'd like a little better than  
25 a week to respond.

1 MR. TJADEN: Counsel submitted his brief --

2 MR. SILVERBERG: On the subpoena I haven't  
3 submitted a brief.

4 Your Honor, I am just advised that the  
5 Respondent will be unavailable until the end of  
6 February.

7 THE COURT: Where will he be?

8 MR. BARTONE: In the middle of February I am  
9 going away for a few weeks.

10 THE COURT: Make it earlier in February.

11 THE CLERK: February 6th.

12 THE COURT: When are you going away?

13 MR. BARTONE: My wife would know that.

14 THE COURT: 3:30 February 6th.

15 MR. SILVERBERG: When does the Petitioner have  
16 to have his brief in?

17 THE COURT: Two weeks.

18 MR. SILVERBERG: Two weeks from today?

19 THE COURT: Yes.

20 MR. SILVERBERG: Answering brief?

21 THE COURT: Try to get it in as early as possible.  
22 The earlier I get it the more likely I am to read it.

23 In this case, I have read your brief and have  
24 been prejudiced by your excellent statement of law and  
25 facts. So you are way ahead.

1 MR. SILVERBERG: May I have an opportunity to  
2 respond to the Government's brief?

3 THE COURT: Yes, but bear in mind that I am  
4 going to hear you on the 6th.

5 Please try to be of some help to me because I  
6 don't know anything.

7  
8 \* \* \*

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1  
2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF NEW YORK  
4 -----x

5 UNITED STATES OF AMERICA AND F.T. :  
6 BRADY,

7 -against- : 76-C-29

8 B. & E. PAVING COMPANY, :  
9 Defendant.

10 -----x

11 United States Courthouse  
12 Brooklyn, New York

13 February 6, 1976  
14 3:30 o'clock P.M.

15 B e f o r e :

16 HONORABLE JACK WEINSTEIN, U.S.D.J.  
17  
18  
19  
20

21 MICHAEL PICOZZI  
22 OFFICIAL COURT REPORTER  
23  
24  
25

1  
2 **Appearances:**  
3

4 JOHN J. TJADEN, ESQ.  
5 Assistant U.S. Attorney  
6 for the Eastern District of New York

7 S. SILVERBERG, ESQ.  
8 Attorney for the Defendant  
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1 MR. SILVERBERG: To put this witness in context,  
2 your Honor, to lay a little background, one of the  
3 objections which the respondent has to the endorsement  
4 of the Internal Revenue summons which has been issued  
5 is that the partnership is of such a nature that the  
6 records, books and records of the partnership, are  
7 subject to Fifth Amendment privilege in that they fall  
8 under the exception in the Bellis case -- according to  
9 the nature and the operation of the partnership. And  
10 Mr. Kaufman is the accountant who does the bookkeeping  
11 for the partnership and is fully familiar with the  
12 operation of the partnership.

13 THE COURT: Go ahead.

14 G E R A L D L . K A U F M A N , a witness called herein  
15 was sworn by the Clerk of the Court and testified as  
16 follows:

17 DIRECT EXAMINATION

18 BY MR. SILVERBERG:

19 Q Mr. Kaufman, would you describe briefly the  
20 function which you performed for B & E Paving?

21 A I was like their bookkeeper, I kept their books,  
22 their checks, entered into their cash receipts, their  
23 disbursements, I prepared payroll taxes, partner returns, and  
24 their personal income tax returns.

25 Q Mr. Kaufman, during what period of time did you

1 perform this service?

2 A From approximately May of 1971 until September  
3 of 1973.  
4

5 MR. SILVERBERG: Your Honor, I would like to  
6 introduce at this time a certified copy of the  
7 business certificate which was filed in the County  
8 Clerk's Office of Queens County.

9 THE COURT: All right. Mark it in evidence.

10 MR. SILVERBERG: Respondent's in evidence.

11 THE CLERK: Respondent's Exhibit 1 in evidence.

12 (So marked.)

13 THE COURT: Proceed.

14 BY MR. SILVERBERG:

15 Q Mr. Kaufman, I would like to go into some of  
16 the aspects of the functionings of the partnership. To your  
17 knowledge, how many signatures were required on the -- how  
18 many signatories were permitted on the partnership checking  
19 account?

20 MR. TJADEN: I object to this question. It's  
21 calling for hearsay.

22 THE COURT: Overruled.

23 A There was either or, either Henry Esposito or  
24 Joe Bartone.

25 Q Mr. Kaufman, where were the records of the

Kaufman-direct

5

partnership kept during the partnership's business activities?

A At Mr. Esposito's home, I think it is 144-41,  
71st Road in Flushing.

Q And periodically, when you performed your  
functions, where did you obtain these records?

A Normally I would go to Mr. Esposito's home and  
pick up the records, but on many occasions when he didn't have  
the records because Mr. Bartone might be carrying the payroll  
book in his car or might have the checkbook with him, they  
would deliver it to me, to my office.

Usually Mr. Bartone would bring it to the office.

Q Mr. Kaufman, to your knowledge, about  
approximately when did the business B & E Paving terminate  
active business?

MR. TJADEN: Objection.

THE COURT: Overruled.

A Late in 1972, I would say October probably.

Q To your knowledge, what were the terms of the  
separation or dissolution?

MR. TJADEN: Objection.

THE COURT: Overruled.

A The partnership, each partner walked away and  
Mr. Bartone undertook to pay all the debts of the corporation.

THE COURT: Of the partnership.

Kaufman-direct

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THE WITNESS: I'm sorry, yes, partnership.

3

4

5

Q With regard to the records of the partnership,  
was there an agreement made regarding disposition of the  
records?

6

A As far as I know --

7

8

THE COURT: No, were you present when they  
agreed?

9

THE WITNESS: No.

10

THE COURT: Sustained.

11

MR. SILVERBERG: There was no objection made.

12

MR. TJADEN: Objection.

13

14

Q Mr. Kaufman, to your knowledge -- strike that,  
please.

15

16

To your knowledge, subsequent to the dissolution  
of the partnership, who had possession of the records?

17

MR. TJADEN: Objection.

18

THE COURT: I will permit it.

19

A Mr. Bartone. Whatever I needed I had to call him.

20

21

Q If you know, Mr. Kaufman, where were the  
records kept?

22

A That I can't say.

23

24

Q Mr. Kaufman, did you prepare the required tax  
returns for the business?

25

A I did.

1

2

Q For which years did you prepare those returns?

3

A 1971, 1972, and for a short period in 1973.

4

Q For the period 1973, could you describe the nature of the income and expenses of the partnership?

6

MR. TJADEN: Objection.

7

THE COURT: Overruled.

8

A Well, the 1973 income was left over from 1972 because the business was operating on a cash basis and the expenses were those which had not been paid because there was no money at the end of 72 to pay it. They paid it in 1973 as the money came in.

13

Q When you say they --

14

A Mr. Bartone actually. When I refer to they, I still think of them as partners.

16

Q In fact, Mr. Bartone undertook to pay all the debts of the partnership?

17

18

A Yes. He brought me all the books in 1973. They brought them to my office.

19

20

Q I would like to go back to the inception of the business, were you the bookkeeper who took care of the financial affairs of the business from the inception?

21

22

23

A To the best of my knowledge, yes.

24

Q Did you prepare the employment application number?

25

Kaufman-direct

8

1  
2 A Yes.

3 Q Could you describe, to your knowledge, the  
4 division of activities between Mr. Esposito and Mr. Bartone?

5 MR. TJADEN: Objection.

6 THE COURT: Overruled.

7 MR. TJADEN: I don't think a proper foundation  
8 has been laid with respect to his knowledge.

9 THE COURT: Overruled.

10 A Mr. Bartone took care of the financial end and  
11 got the jobs; and Mr. Esposito supervised the jobs. He was  
12 the field man.

13 Q As far as keeping the records, the daily  
14 records of the business, and day to day supervision of the  
15 business, to your knowledge, who was the person who had  
16 charge of these activities?

17 A Mr. Bartone.

18 Q Mr. Kaufman, was there an audit of the partner-  
19 ship for the year 1971 performed?

20 A Yes.

21 Q Who was the revenue agent?

22 A Agent Levitt, and he was assisted -- I don't  
23 remember the gentleman's name. A gentleman who was introduced  
24 to me as being from the national office in Washington.

25 Q Was that audit completed to your knowledge?

1  
2 A I've never heard anything on the audit although  
3 I did file a power of attorney. The last I heard was when  
4 they were in my office and they picked up all of the records  
5 for 1971.

6 Q Where to your knowledge are the records for  
7 1971 now kept?

8 A In the possession of Mr. Levitt. There is a  
9 receipt he gave me.

10 Q Have you subsequently asked for their return?

11 A No.

12 MR. SILVERBERG: I have no further questions.

13 THE COURT: Any cross-examination?

14 MR. TJADEN: Yes.

15 CROSS-EXAMINATION

16 BY MR. TJADEN:

17 Q Mr. Kaufman, did you observe the day to day  
18 operations of the business of B. & E. Paving Company? Were  
19 you on their business premises every day?

20 A No.

21 Q Did you maintain your own office?

22 A Yes.

23 Q You are accountant?

24 A Yes.

25 Q Certified Public Accountant?

1

A Yes sir.

2

3

Q You have other clients besides B. & E. Paving?

4

A Yes.

5

6

Q Apparently then you did not have occasion to observe the differences in the duties between Mr. Bartone and Mr. Esposito?

7

8

A Well, it depends on how you look at that. I met with them many times in the evening at Mr. Esposito's home with both partners.

9

10

11

Q Were employees present at that time?

12

13

A Yes, on occasion there was one of their salesman present, yes.

14

15

Q But they weren't operating the business during the --

16

17

A They weren't running the machines, no.

18

Q They did have employees, it wasn't just Mr. Bartone and Mr. Esposito?

19

20

A That is correct. Mr. Esposito would give the men their work in the field and supervise them.

21

22

Q Do you know if he had someone keep the books on a day to day basis other than yourself?

23

24

A No one to my knowledge.

25

Q Did you ever tell revenue agent Mr. Levitt that Mrs. Bartone worked on the books?

Kaufman-cross

11

1  
2 A Not as Mrs. Bartone -- she did some of the  
3 payrolls from time to time but -- your Honor, I have to  
4 explain this. She was a Mrs. Bartone but Mr. Bartone's  
5 brother's divorced wife.

6 Q Now divorced?

7 A Divorced then.

8 Q A former sister-in-law?

9 A Yes. She did payrolls from time to time, yes.

10 Q There is no doubt in your mind that that was a  
11 partnership operation, is that correct?

12 MR. SILVERBERG: I don't understand the purpose  
13 of the question.

14 Do you challenge the fact there was a partnership?

15 MR. TJADEN: No I don't.

16 Q Was it a partnership operation, Mr. Kaufman?

17 MR. SILVERBERG: Your Honor, that calls for  
18 an opinion from the witness.

19 THE COURT: Sustained. I think we have enough.  
20 It is a partnership for the purposes of the hearing.

21 Q The partnership returns were filed?

22 A Yes, they were filed.

23 Q When you testified earlier, according to your  
24 understanding, that Mr. Bartone took over paying the debts  
25 that had been incurred during the year 1972, were the payments

Kaufman-cross

12

made from the income that was derived during 1973?

A Not all of them.

Q For the most part was that the source?

A No. When I say debts, I'm not talking about the ordinary day-to-day debts as for asphalt or telephone or things like that, the debts that I am referring to that they told me conclusively that Mr. Bartone was taking over were the note payments such as on the trucks and the cars and some of the equipment which had been purchased. And the notes to the bank.

Q Do you know who had signed those notes?

A Mr. Bartone.

Q Have you seen those notes?

A Not recently, no. Before they were prepared, yes.

Q I believe you testified that while you were doing accounting work for them the records were kept at Mr. Esposito's home, is that correct?

A The checkbook and payroll books and bank statements were picked up at his home, yes.

MR. TJADEN: I have nothing further.

THE COURT: Do you have any work papers?

THE WITNESS: No sir.

THE COURT: What happened to the work papers?

Kaufman-cross

13

1  
2 THE WITNESS: In our practice, whenever a  
3 client goes out of business we give him the option  
4 of taking them if they want. We don't do any certified  
5 work. We consider all work papers to belong to the  
6 client.

7 THE COURT: Who has the work papers?

8 THE WITNESS: I assume Mr. Bartone.

9 THE COURT: Did you turn them over to Mr.  
10 Bartone?

11 THE WITNESS: Yes.

12 THE COURT: Those are papers you prepared and  
13 had in your possession?

14 THE WITNESS: Yes.

15 THE COURT: When did you turn them over?

16 THE WITNESS: I think in 1973, '74. I really  
17 don't remember.

18 THE COURT: You have no record?

19 THE WITNESS: I have personal income tax  
20 records because I still do that.

21 THE COURT: All right, you can broaden your  
22 subpoena to include that material. If you want to  
23 serve a personal subpoena on this accountant you may  
24 do it.

25 You are ordered not to turn over any further

1 records to Mr. Bartone. Is that clear?

2 THE WITNESS: Yes sir.

3 THE COURT: Thank you.

4 Are you going to have further witnesses?

5 MR. SILVERBERG: No.

6 THE COURT: Are you?

7 MR. TJADEN: No.

8 MR. SILVERBERG: Except I would like to continue  
9 the cross-examination of the special agent that was  
10 adjourned from the previous hearing.

11 THE COURT: Do you want to do it this afternoon?

12 MR. SILVERBERG: Yes, your Honor.

13 THE COURT: Three o'clock the trial will be  
14 continued.

15 (A recess taken at this time until 3:00 p.m.  
16 this afternoon.)

17  
18 (Luncheon recess)  
19  
20  
21  
22  
23  
24  
25

1                   AFTERNOON SESSION (3:00 p.m.)

2                   THE CLERK: Business certificate previously  
3 marked Defendant's Exhibit 1 re-marked Defendant's  
4 Exhibit B.

5                   MR. TJADEN: With respect to the documentary  
6 evidence I would also like to point out that the  
7 document that has been received for Identification  
8 purposes is marked Government Exhibit 1 but in  
9 actuality it was produced at the request of the  
10 respondents.

11                   Before we begin the further testimony, your  
12 Honor, I would at this time like to move that the  
13 scope of Special Agent Brady's testimony be expanded  
14 to include the work papers of Gerall Kaufman.

15                   THE COURT: All right, granted.

16                   F R A N C I S   B R A D Y , was re-called to the witness  
17 stand and testified further as follows:

18                   MR. SILVERBERG: Obviously, your Honor, at the  
19 previous hearing, we adjourned the cross-examination  
20 pending the determination by the Court as to the  
21 subpoena duces tecum which was served upon Agent  
22 Brady and before I continue I would like to have a  
23 determination from the Court whether or not the  
24 documents which we requested are subject to production  
25 at this time under Rule 45.

Brady

16

2 1  
2 In this regard, there are some arguments made  
3 by the Government in its memorandum which are important  
4 and that I would like to speak to. Basically, one  
5 of the principal arguments made by the Government is  
6 that if the summons was served in good faith and prior  
7 to prosecution, then it should be enforced; and if  
8 it was not served in good faith and prior to prosecution,  
9 then it should not be enforced. But then there  
10 is an argument in the Government memorandum that  
11 regardless of the subpoena duces tecum seeking the  
12 records or other documentation showing whether or not  
13 that the recommendation was made is irrelevant and  
14 I cannot understand such an argument. It is assuming  
15 the argument and then saying it is not relevant.

16 On the previous hearing it is true that the  
17 witness testified that he had made no recommendation  
18 for prosecution but according to the Donaldson case  
19 the recommendation can be made, can be assumed to be  
20 made when the investigation is so far along as to  
21 allow conclusions to be made and whether or not the  
22 witness formally has written up a recommendation for  
23 the prosecution, which may be the case, there is likely  
24 to be documentation in his file bearing on whether  
25 or not he has made conclusions regarding the case.

Brady

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There is also language in the Donaldson case to the effect that if he determines in his own mind that the criminal prosecution should be recommended, then the issue of whether or not the case has been recommended for prosecution comes into issue. That is the time when a recommendation for prosecution has been deemed to have been made. This is language quoted by the Government in its memorandum. It is important to keep that in mind.

A second point is that the documents sought are not sought under an application for discovery. It is sought under a subpoena duces tecum. In the cases cited by the Government they discuss an application for discovery. This is not technically an application for discovery. This is a process in conjunction with testimony at a hearing and I would refer your Honor to the Wall case, which did not hold for the taxpayer in this case but it has very relevant language to the effect that if testimony can be brought out that would justify going further than the oral testimony, then the subpoena duces tecum served in that case would be honored and be allowed to be enforced.

I would go on in further cross-examination and

4 1  
2 I feel that the foundation has been laid by the  
3 chronology of events to date to justify your Honor  
4 ruling that the subpoena duces tecum should be per-  
5 mitted.

6 As far as the Government's argument that it is  
7 vague, I do not see how it can be argued that what  
8 a recipient has been asked to produce can be confusing.  
9 We ask for documents in the file bearing on his  
10 recommendation for criminal prosecution or his  
11 determination of criminal liability. If such documents  
12 do exist, they are certainly relevant to this issue  
13 whether or not the summons was issued in good faith.  
14 So, to argue, to take part of the subpoena where it  
15 says any and all documents, reports, correspondence  
16 and communications and just quote that is not quoting  
17 what we are seeking. We are seeking with respect to  
18 the criminal liability or recommendation for criminal  
19 prosecution of Joseph Bartone for the year 1972. There  
20 is no confusion in what we seek. If there are  
21 documents to that effect, that is easily proven and  
22 if the Government argues that some of the records bear  
23 on another taxpayer's investigation, then your Honor  
24 in an in camera fashion, the way your Honor did with  
25 the first document at the first hearing, can excise

Brady

or read into the record those portions which are relevant to this issue.

If the Government argues that this information is privileged because it dealt with another taxpayer's tax liability, I cite in my supplemental memorandum the regulation which the Government cites and I point to subsection (c)(1)4, which says a return of a partnership shall be open for inspection by any person who is a member of the partnership during any part of the period covered by the return upon submission of satisfactory evidence of such membership.

Certainly the Government does not argue Mr. Bartone was not a member of the partnership. The argument is that the return or any information dealing with the return is privileged.

THE COURT: What page is that on?

MR. SILVERBERG: Page 24 of the supplemental memorandum.

THE COURT: It says the return of the partnership and not the return and relevant information. Return is a technical term.

MR. SILVERBERG: Yes, your Honor. The Government cites another section of the code which defines return as a technical return and all other relevant documents

1 bearing or affecting and bearing on the return.  
2

3 THE COURT: I would think those documents are  
4 submitted by the taxpayer not the internal investiga-  
5 tion.

6 MR. SILVERBERG: I cannot see how arguing that  
7 the investigation bears upon the tax liability of  
8 another taxpayer who is a partner in a two-man partner-  
9 ship can preclude the taxpayer who is being investigated  
10 from access to relevant documents.

11 THE COURT: They will certainly let him see the  
12 partnership return and anything submitted by any  
13 partner in connection with that return.

14 MR. SILVERBERG: Then I submit, your Honor, the  
15 argument made by the Government is erroneous. They  
16 are arguing whether the return is privileged and the  
17 return is not privileged.

18 THE COURT: They never argued the return is  
19 privileged because your client has a copy of the  
20 return, doesn't he?

21 MR. SILVERBERG: It is not the return that  
22 they are arguing is privileged. Obviously they are  
23 arguing that relevant documents bearing upon the  
24 accuracy of the return.

25 THE COURT: That is right, those are documents

Brady

1  
2 they have assembled themselves not that your client  
3 or any partner has submitted.

4 MR. SILVERBERG: But if they are afraid of a  
5 disclosure because of disclosing information on a  
6 return, that is their argument and --

7 THE COURT: I do not believe it is.

8 What documents does this witness have that might  
9 bear on it?

10 MR. TJADEN: I think we can handle it very  
11 simply. I am happy Mr. Silverberg did address himself  
12 to this question. We do not have any documents that  
13 are called for in the subpoena. We have no document  
14 that relates to the criminal liability of Joseph  
15 Bartone or a recommendation for criminal prosecution  
16 of Joseph Bartone, because it has already been  
17 established no such recommendation has been made.

18 THE COURT: That is your answer?

19 MR. SILVERBERG: Your Honor, to say the oral  
20 testimony establishes the fact --

21 THE COURT: Have you checked the documents?

22 MR. TJADEN: Yes, I have, your Honor.

23 THE COURT: If you so certify, that is sufficient  
24 for me.

25 MR. SILVERBERG: Is Mr. Tjaden saying there are

Brady

1 no correspondence or communications between Mr. Brady  
2 and any other officer or employee of Internal Revenue  
3 Service or of the Department of Justice bearing upon  
4 criminal liability of Joseph Bartone?  
5

6 MR. TJADEN: That is correct, there is no  
7 correspondence or memoranda that would bear upon his  
8 criminal liability at this time or any recommendation  
9 of Mr. Brady, any recommendation for criminal prose-  
10 cution, let me add that.

11 MR. SILVERBERG: Are there any documents bearing  
12 upon conclusions as to recommendations?

13 MR. TJADEN: I think we have sufficiently  
14 answered the question.

15 THE COURT: I think that is so.

16 Have you reached a determination yet as to  
17 whether this should be a criminal prosecution?

18 THE WITNESS: No, your Honor.

19 THE COURT: Are you still investigating the  
20 possible civil liabilities?

21 THE WITNESS: Yes, your Honor.

22 MR. SILVERBERG: Your Honor, may I ask a few  
23 more questions bearing upon this?

24 THE COURT: You may.

25 (Continued on next page.)

Brady-cross

CROSS-EXAMINATION

BY MR. SILVERBERG:

Q Mr. Brady, when were you assigned the investigation of the 1972 return of B. & E. Paving?

A I was assigned the investigation of B. & E. Paving on May 1975.

Q May 1975?

A Yes.

Q For which years?

A On the particular assignment sheet the year covered is 1971.

Q And did you on your own decide to investigate 1972?

A Well, the normal procedure is that an investigation, a joint investigation, the normal procedure for a joint investigation with the intelligence division and the audit division is to extend the investigation beyond one year and it was extended.

Q You were originally to do 1971. Have you drawn any conclusions regarding criminal liability or recommendation for criminal prosecution for respondent for 1971?

MR. TJADEN: I object, it is not relevant to the issue before the Court. The issue is enforcement

Brady-cross

24

1  
2 of summonses for the tax year 1972.

3 MR. SILVERBERG: Your Honor, if the conclusion  
4 has been made regarding 1971 it is very likely, and  
5 if the conclusion as to the recommendation for criminal  
6 prosecution --

7 THE COURT: I will allow the question.

8 MR. SILVERBERG: -- 1972 is certainly relevant.

9 THE WITNESS: No, sir.

10 Q Have you concluded your investigation for 1971?

11 A No, sir.

12 MR. TJADEN: Objection.

13 THE COURT: It has been answered.

14 Q Have you made a civil determination for 1971?

15 A No, sir.

16 Q Is 1971 still open for investigation?

17 A Yes, sir.

18 Q Are you investigating B. & E. Paving Co. with  
19 any revenue agents in a joint investigation?

20 A Yes, sir.

21 Q What is the name of the revenue agent?

22 A Howard Levitt.

23 Q Are you still investigating 1971?

24 A Yes, sir.

25 Q Have you made any tentative conclusions regarding

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criminal liability?

MR. TJADEN: Objection.

THE COURT: Sustained.

(Continued on next page.)

1 MR. SILVERBERG: Your Honor, unfortunately the  
2 witness I called this morning is not able to be here  
3 but there were certain determinations that were made  
4 regarding 1971 which were related to him.

5 THE COURT: That there was going to be a  
6 criminal prosecution.

7 MR. SILVERBERG: At least there was a determin-  
8 ation on civil already made and if 1971 is still being  
9 investigated after a determination of the civil  
10 liability is already made then the only thing left to  
11 be investigated is the criminal liability.

12 MR. TJADEN: I will object to that, it is a  
13 conclusion.

14 THE COURT: Did you tell the accountant that  
15 civil liability has been determined?

16 THE WITNESS: No, your Honor.

17 THE COURT: Do you know whether anybody has  
18 told him that?

19 MR. SILVERBERG: Mr. Levitt is here and I would  
20 like to call him.

21 THE COURT: Do you have anything further from  
22 this witness?

23 MR. SILVERBERG: No, your Honor.  
24  
25

Levitt-direct

1  
2 H O W A R D L E V I T T , having first been duly sworn  
3 by the Clerk of the Court, took the witness stand  
4 and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SILVERBERG:

7 Q Mr. Levitt, were you the revenue agent who  
8 conducted the -- let us backtrack. What is your function  
9 with Internal Revenue Service?

10 A I am a revenue agent. I am with the audit  
11 division.

12 Q Were you the revenue agent who conducted the  
13 1971 audit?

14 A Yes.

15 Q And where was the audit conducted?

16 A Well, the audit was conducted -- we went to  
17 Mr. Kaufman's office a few times.

18 Q Did you get cooperation from the taxpayer?  
19 Did Mr. Kaufman produce the books you requested?

20 A He didn't submit records for 1971, yes.

21 Q And at the end of your audit of the books did  
22 you express to Mr. Kaufman conclusions regarding 1971?

23 MR. TJADEN: Objection, if your Honor please.

24 Mr. Silverberg is addressing tax questions to the  
25 tax year 1971 and we are concerned with the 1972 audit

Levitt-direct

in this action.

THE COURT: I will allow it but let us get closer to this if we can shortly.

Q Did you express to Mr. Kaufman a conclusion regarding his determination for 1971 civilly?

A We were forced to because we had to. We did not get any cooperation from the taxpayer extending the statute of limitations. If we do not have the extension of the statute of limitations we must go through a 90 day letter which does not necessarily mean that the audit is completed. We have to make adjustments on what we have and there were things lacking. We did establish at that time that there was an omission of \$7600 so on that basis we had something to go on. I had to tell Mr. Kaufman that I was going to issue a 90 day letter and these were our findings based on a minimum of records we have available. So really the examination was far from completed. But for the 90 day letter in order to protect the statute we had to issue a report.

Q Did you issue a 90 day letter?

A Well then after the 90 -- after I submitted my 90 day report they decided they would issue -- they would assign the 872 and extend the statute and now we were forced to issue a report.

Q Was it your recommendation that the case be

Levitt-direct

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referred to intelligence in 1971?

A Yes I made -- we have a form we fill out, fraud referral, yes.

Q And you are continuing to investigate 1971 even after you were ready to issue a 90 day letter?

A I am sorry?

Q You are continuing to investigate 1971 even though you were prepared to issue a 90 day letter?

A Well, the 90 day letter, we were forced to issue at that time. We have to protect the statute and it is this procedure.

MR. SILVERBERG: No further questions.

THE COURT: Thank you very much.

Do you have any further evidence?

MR. SILVERBERG: Your Honor, I would like to discuss the legal issues that are before the Court now.

THE COURT: All right.

MR. SILVERBERG: First of all --

MR. TJADEN: Has the respondent rested?

THE COURT: Yes, we have heard all the evidence.

MR. SILVERBERG: We have several issues involved in whether or not the summons is enforceable. First, whether or not it was issued in bad faith and prior to

1 a recommendation for prosecution.

2 THE COURT: On that I find there is a matter  
3 of fact no decision has been reached as to either 1971  
4 or 1972 tax return with respect to whether criminal  
5 proceedings will be conducted.

6 I further find that in good faith the Government  
7 is proceeding civilly and this investigation is not  
8 solely for the purpose of gathering data for a  
9 criminal prosecution.

10 MR. SILVERBERG: Your Honor, I would submit  
11 that the chronology of events is very unusual for a  
12 normal civil investigation.

13 THE COURT: That is true but I have assessed  
14 the credibility of the two Government witnesses and  
15 I believe they are telling the truth.

16 MR. SILVERBERG: On the issue of the respondent's  
17 assertion of his Fifth Amendment privilege is, first  
18 regarding the documents, I submit your Honor, that  
19 the evidence we have heard from the bookkeeper of the  
20 business and the affidavits submitted by the respondent  
21 which your Honor has agreed is relevant to the motion,  
22 clearly sets forth a picture of a business which was  
23 primarily a matter of running a business with two  
24 people instead of one person and that in comparing  
25 the facts of this case with Slutsky which has been

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1 discussed at length in my memorandum, the facts are  
2 so much on point, Slutsky being a second circuit case,  
3 the Court should heavily consider the validity of the  
4 assertion.

5 The Bellis case, which does not close the door  
6 on the assertion of a Fifth Amendment privilege as to  
7 books and records of a partnership, it clearly has in  
8 mind a small partnership of a small number of people  
9 run very personally as is the case in this case. The  
10 partnership in Slutsky was a multi-million dollar  
11 hotel, the Nevele. This is far from comparable in  
12 scope to that. There are fewer people involved in  
13 this partnership than in the Nevele and Slutsky.

14 The closeness with which Mr. Bartone ran the  
15 business, the fact he was principally involved in  
16 getting the orders and keeping the day-to-day records,  
17 supervising the day-to-day operations, is on all  
18 fours with the language of Slutsky.

19 If the Government argues the mere fact that  
20 the partnership involved in B & E Paving was not a  
21 partnership of brothers as in Slutsky, I would point  
22 out that the concept that because a business is run  
23 by two related parties and should therefore be  
24 accorded more confidentiality than one between two  
25 non-related associates has no specific authorization

1 in law. There is except for husband and wife, there  
2 is no confidentiality between cousins or between  
3 brothers. There is no reason why a partnership of  
4 brothers should be accorded more favor in the eyes of  
5 the law than cousins or than in-laws or any other.

6 THE COURT: I agree with you. I find the  
7 Slutsky case one I have never been able to understand  
8 and one I consider that will probably be restricted  
9 to its facts.

10 MR. SILVERBERG: Your Honor, I submit that the  
11 language of the Bellis case similarly does not go on  
12 the assertion of Fifth Amendment privilege. They  
13 clearly speak of holding records in a custodial  
14 capacity and representative capacity even in the case  
15 of a dissolved partnership, where the other partners  
16 have a right to see the records. This is not the  
17 case here.

18 New York law specifically states, upheld by  
19 the Court of Appeals, where a partnership interest is  
20 sold the selling partner no longer has a right to  
21 accounting or any action in law or equity as to  
22 transactions of the partnership.

23 THE COURT: After the sale.

24 MR. SILVERBERG: No, not transactions after  
25 the sale, but after the sale he no longer has a right,

1 he has sold his right except for fraud, he has sold  
2 his right to any accounting or any action in relation-  
3 ship to the transactions of the partnership and the  
4 Kershner case in 1967 upholds that where two persons  
5 own papers jointly and one conveys the papers to the  
6 other it is an absolute sale. There is no argument  
7 that the other one holds it in a representative  
8 capacity and that you can reach it by serving the  
9 selling partner. It is the buying person's property  
10 and this is how these records are being traded and  
11 there is no dispute on those facts from the Government.

12 I cannot see any clearer demonstration or any  
13 clearer evidence of personal papers of a party, albeit  
14 they may have been business records at one time, even  
15 then they were very personal business records. They  
16 are now the sole property of the taxpayer and to  
17 argue that they are held in a representative capacity  
18 when the other party, the other partner no longer has  
19 a right to them, no longer has an accounting as to  
20 the transactions, is going directly against even the  
21 language in Bellis.

22 The principle that Bellis asserted was that  
23 there is a representative capacity you cannot claim  
24 just because it is a partnership it is privileged.  
25 This is in accord with White. We do not dispute

1 White. But on the facts and on the language in  
2 Bellis they do not foreclose ever conceivably or  
3 ever reasonably an assertion of Fifth Amendment  
4 privilege. And if Your Honor feels that Slutsky  
5 should be held to the facts the language in Bellis  
6 still permits on the circumstances which I believe is  
7 in this case, the assertion of Fifth Amendment privilege  
8 where you are holding the papers in a personal capacity,  
9 where you have obtained ownership of the papers that  
10 barred all other persons from control and access as  
11 to logs and content. These are the taxpayers papers  
12 and because it was once partnership property does not  
13 foreclose the valid assertion of the Fifth Amendment  
14 privilege in this circumstances.

15 THE COURT: Well, the law is certainly not  
16 clear in this area. Neither in the Second Circuit  
17 nor the United States Supreme Court have they ap-  
18 proached it with crystal clarity. With all due  
19 respect I think their analysis leaves something to be  
20 desired. I am not going to write a full opinion in  
21 this case.

22 I find as a matter of fact that the papers  
23 the Government seeks were created primarily by an  
24 accountant for an artificial entity, the B & E Paving  
25 Company. Those papers include books and records

1 primarily posted by that accountant and worksheets  
2 of that accountant used in preparing the tax return  
3 for the partnership.  
4

5 The partnership was a formally organized  
6 partnership under the laws of the State of New York.  
7 It owned substantial property including road building  
8 equipment and asphalt and other products, paid bills,  
9 entered into purchase agreements and took loans as a  
10 partnership.

11 There is evidence from the accountant --

12 MR. SILVERBERG: He said the notes were signed  
13 by Joseph Bartone.

14 THE COURT: There were partnership assets and  
15 he took over the partnership assets and the liabilities  
16 of the partnership. That is the way I interpret his  
17 testimony.

18 MR. SILVERBERG: And the ownership of the  
19 documents.

20 THE COURT: Documents were produced for and by  
21 the artificial business entity before it was dissolved.  
22 That artificial business entity has now been dissolved.  
23 Although we do not have a certificate indicating the  
24 dissolution I assume, based upon the testimony of the  
25 accountant, that it is a de facto dissolved --

MR. SILVERBERG: It is dissolved, all the final

1 returns have been filed.

2 THE COURT: You have not dissolved it by  
3 filing a certificate which, as I understand, is the  
4 normal way you terminate a business entity in New  
5 York State.

6 MR. SILVERBERG: There has not been any business  
7 in B & E Paving since 1972.

8 THE COURT: Although there has been no proof  
9 of any such certificate being filed I find as a matter  
10 of fact and law it has been de facto dissolved and  
11 that all of the assets, including the papers, have  
12 been turned over to Joseph Bartone, a former partner  
13 in B & E Paving Company.

14 No privilege against self incrimination was  
15 involved in the creation of these documents. The  
16 documents did not constitute any statement by this  
17 respondent. The documents did not have anything of  
18 a confidential, personal nature when they were produced.

19 MR. SILVERBERG: Your Honor, I would take  
20 exception to that conclusion.

21 THE COURT: There is a question under the  
22 cases as to whether even such documents which are in  
23 the private possession of individuals are privileged  
24 going back to the Boyd case. I think those cases  
25 myself are all contrary to sound principle.

1           This kind of business document should be dis-  
2           tinguished from a document such as a diary or personal  
3           papers which is analagous to a private statement.  
4           Even such documents could well be and probably should  
5           be excluded from the privilege against self incrimination  
6           because they were not created under compulsion.  
7           Privilege directed primarily towards creating testi-  
8           mony or documentary evidence under compulsion. There  
9           are cases that this kind of personal documentation can  
10          be privileged.

11           There might also be a claim of privilege in  
12          that the defendant or here the respondent, if he  
13          responded to the subpoena, would in effect be saying  
14          that he is connected to the documents. That could  
15          itself be incriminatory by giving up a weapon or  
16          something like that. He may be able to defend himself  
17          against the subpoena on the ground you are in effect  
18          compelling the respondent to say, "I do have this  
19          incriminatory document in my possession and it can be  
20          therefore used to build up a case against me."

21           That argument cannot be made here because the  
22          accountant hadn't told us that Joseph Bartone has all  
23          of these papers in his possession. We know that and  
24          because he has admitted in the papers that he obtained  
25          them from the partnership. I can see no reason at all

1 in principle for applying privilege to documents of  
2 this kind.

3 I recognize that the cases are in conflict.  
4 and that there has not been a satisfactory rationale  
5 but I do not believe that it would be useful for me  
6 to write a fuller opinion on the issue because I do  
7 not believe that the Appellate Court would pay any  
8 attention to an analysis I would put forward.

9 MR. SILVERBERG: Your Honor, I would ask a  
10 ruling on the oral testimony that is sought in  
11 connection with the documents. I think in that case  
12 there is no question whatsoever that any oral testimony  
13 is privileged.

14 THE COURT: I believe you are right. Any oral  
15 testimony of this defendant might be incriminatory  
16 and might clearly be compellable. You are entitled  
17 to be protected from that.

18 Is the Government intending the contrary?

19 MR. TJADEN: To a certain extent we believe  
20 the respondent can be and should be required in  
21 conjunction with producing the documentation and  
22 authenticating it.

23 THE COURT: No, I do not believe he is required  
24 at this stage to do anything in the way of authenti-  
25 cating. It seems to me you go as far as you possibly

1 can go by forcing him to turn it over.

2 MR. TJADEN: And also in addition to authenti-  
3 cating I would suggest and submit should be required  
4 to testify that these are all of the documents that  
5 he has in his possession.

6 THE COURT: No, I do not believe you can compel  
7 any testimony from him at this stage. I am convinced  
8 he does run a serious risk of criminal prosecution  
9 and he might incriminate himself by giving you any  
10 further information orally. No oral testimony, but  
11 you can get the documents.

12 With respect to the work product of the  
13 accountant there are also conflicting cases there.  
14 I find those are the papers of the accountant and not  
15 the papers of the respondent. Turning them over to  
16 the respondent does not make them any more privileged  
17 than they would be in the hands of the accountant.

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19 (Continued on next page)  
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1 MR. SILVERBERG: Your Honor, Mr. Kaufman never  
2 acted as an independent accountant. He never certified  
3 to any third person any of the accuracy. He relied  
4 solely on the books and records of the partnership  
5 as they existed, the checkbook and just the basic  
6 documents and they are not work papers of an accountant  
7 as that term is defined. He basically is an employee  
8 and was an employee of B.E. Paving Company and the  
9 papers that he produced are the property of B.&E.  
10 Paving Company. He is not an independently retained  
11 professional giving independent accounting services.

12 THE COURT: I just do not believe that. He is  
13 a Certified Public Accountant, not a bookkeeper. He  
14 did not certify any statement but that does not make  
15 him any less an independent contractor. This man is  
16 obviously an experienced and highly competent accountant.  
17 He was not a bookkeeper even though he did keep books  
18 and did not certify.

19 MR. SILVERBERG: That is all he did.

20 THE COURT: He prepared returns. The Government  
21 has the returns.

22 MR. SILVERBERG: An employee of a business can  
23 also prepare returns.

24 THE COURT: He was an independent contractor  
25 in my opinion and I so find as a matter of fact.

1           Are there any other findings of fact or law  
2           you wish?

3           MR. TJADEN: Your Honor, I would like to ask  
4           if we can have some direction of the Court with  
5           respect to the production of the documents Mr. Bartone  
6           has indicated in his affidavit that he is presently  
7           holding. He already has the documents and there  
8           should be no reason for delay.

9           MR. SILVERBERG: We plan to appeal this decision  
10          and I would like a stay of any enforcement pending the  
11          determination of the appeal.

12          THE COURT: All right.

13          MR. TJADEN: An application for a stay would  
14          have to be made.

15          THE COURT: Submit an order granting final  
16          judgment in the case and I will stay pending the  
17          appeal.

18          It is not a clear area.

19          MR. TJADEN: Your Honor, may I ask then the  
20          condition of the stay be attached and that be that  
21          the respondent execute any necessary waiver of  
22          any applicable statute of limitations because limita-  
23          tions could very well run for one of the years. I  
24          understand an extension or waiver was signed by  
25          Mr. Bartone with respect to one of the years. I do not

1 know when the waiver will expire.

2 THE COURT: What do you think about it?

3 MR. SILVERBERG: It is highly irregular. It  
4 has nothing to do with the issue before the Court.

5 THE COURT: Then I will not grant the stay.  
6 He has got a right not to execute any waiver. I  
7 certainly do not want to compel him to give up any  
8 right. But the Government has the right to proceed  
9 expeditiously.

10 MR. SILVERBERG: May I ask the Government when  
11 the statute of limitations expires?

12 MR. TJADEN: I have already indicated I do not  
13 know.

14 MR. SILVERBERG: They could be asking when it  
15 could be expiring at the end of this year and they  
16 could be asking for an extension for another year  
17 and it would not be justified.

18 THE COURT: Is it possible to extend it for a  
19 limited period?

20 MR. TJADEN: I believe the stay could be executed  
21 and related to final disposition by the Court, one  
22 year after final disposition.

23 THE COURT: Why don't you just extend it for  
24 the period between this time, today, and the time the  
25 appeal is finally decided.

1 MR. TJADEN: I do not think that is being  
2 realistic. I do not think the service would be in a  
3 position to act immediately upon the decision of an  
4 Appellate Court, whether it is the Court of Appeals  
5 or Supreme Court.

6 THE COURT: Let us assume that the statute would  
7 expire in July of this year and it takes six months  
8 to finally decide the appeal. We would add six months  
9 to July so that would not put you in a better position  
10 or any worse position.

11 MR. TJADEN: My understanding is that as a  
12 waiver will be executed by Mr. Bartone for the two  
13 years involved extending the applicable statute of  
14 limitations six months beyond disposition.

15 THE COURT: No, by extending the statute by  
16 the amount of time equal to that measured from today's  
17 date to the date that the remand from the highest  
18 court to which an appeal is taken is received in  
19 this court.

20 MR. TJADEN: I really wonder whether there  
21 would be any remand. I imagine any decision would be  
22 a affirmance or a reversal.

23 THE COURT: Not remand, make it a final dispo-  
24 sition, however you want to phrase it, I do not care.

25 MR. SILVERBERG: Your Honor, I would only limit

1 the application to the years that are still open.

2 THE COURT: 1971 and 1972.

3 MR. TJADEN: That is correct.

4 MR. SILVERBERG: 1971 has gone civil.

5 MR. TJADEN: Mr. Levitt testified it is still  
6 open.

7 MR. SILVERBERG: How long has it been extended?

8 THE COURT: Whatever it is you add to it.

9 MR. SILVERBERG: If it is not effectively  
10 extended and if it expires at the end of 1975, then  
11 there is --

12 THE COURT: Then there is nothing to extend.

13 MR. SILVERBERG: That is the point I wish to  
14 make.

15 THE COURT: I think we are agreed on the  
16 substance of what we have here. If it is expired  
17 already then this extension will do no good. Why  
18 don't you sit down and discuss it.

19 MR. SILVERBERG: I would not want to renew  
20 the statute by signing a waiver, if the statute is  
21 already extended.

22 THE COURT: Sit down with your opponent, you  
23 are both good lawyers, and work out the language that  
24 meets these requirements. I think we are all in  
25 agreement.

1 MR. TJADEN: As long as we do understand then  
2 that as a condition to this Court's granting a stay  
3 pending a plea, Mr. Bartone must execute those waivers.

4 THE COURT: Right.

5 MR. TJADEN: For these years.

6 THE COURT: Why don't you sit down and work  
7 out the language.

8 MR. SILVERBERG: I have to consult with other  
9 attorneys from my firm before I bind Mr. Bartone on  
10 this matter.

11 THE COURT: Why don't you sit down and try to  
12 work out the language now and then the Government will  
13 on four days' notice, submit a proposed judgment and  
14 you can submit a counter-judgment or say it is  
15 agreeable. I do not think it is fair to stay the  
16 turning over of these documents and allow the statute  
17 to continue to run. What it really amounts to is the  
18 tolling of the statute during the period, that is  
19 putting it in the simplest form.

20 MR. TJADEN: In other words then, the statute  
21 would be extended for a period equal to the time  
22 remaining from today's date to the date on which the  
23 statute would normally expire?

24 MR. SILVERBERG: I do not follow that.

25 MR. TJADEN: If the statute were to expire in

1 July, five months from now, my understanding is that  
2 the waiver would extend the statute for five months  
3 beyond the Court's decision.

4 THE COURT: How long do you think this appeal  
5 would take?

6 MR. TJADEN: In the Second Circuit my guess  
7 would be approximately a year to 18 months.

8 THE COURT: Let us assume it is 18 months, that  
9 being the outside date.

10 Well, let us assume it is a year, to make it  
11 simpler. Let us assume the statute expires on July 1,  
12 1976, with respect to both years 1971 and '72. It  
13 will be extended one year because of the tolling  
14 during the period of appeal, so instead of expiring  
15 July 1976 it will expire July 1, 1977. Instead of  
16 12 months it is 13 months and therefore it would be  
17 rather August 1, 1977.

18 MR. TJADEN: I think the Internal Revenue  
19 Service would want any waiver to extend to a date  
20 certain.

21 THE COURT: I do not think that is reasonable.

22 MR. SILVERBERG: How could you extend for a  
23 date certain, you do not know how long the appeal would  
24 take.

25 THE COURT: I do not think it is reasonable for

1 you or the respondent to take that decision. I  
2 take one year and it may take 18 months to decide the  
3 appeal. The Government is in trouble if you make it  
4 18 months and if it only takes six months to decide  
5 the appeal then the respondent is disadvantaged  
6 unnecessarily.

7 MR. TJADEN: I understand your Honor is inclined  
8 to grant the stay in that you find there is some like-  
9 lihood of respondent prevailing on appeal.

10 THE COURT: I believe that there is a very  
11 substantial likelihood the respondent would prevail  
12 on appeal in view of the Slutsky opinion which I say  
13 I find completely unjustifiable in theory but that  
14 is what the Second Circuit said.

15 MR. TJADEN: May I ask your Honor if in con-  
16 junction therewith your Honor would consider an order  
17 directing the respondent to maintain the records  
18 pending appeal?

19 THE COURT: Probably it would be a good idea to  
20 turn them over to counsel to hold in escrow.

21 MR. TJADEN: That would be satisfactory.

22 THE COURT: That would be another condition of  
23 the stay.

24 Why don't you sit down and work out the  
25 language. You do not have to go along with it if you

1 do not want to.

2 MR. SILVERBERG: If we determine that we cannot  
3 go along with the waiver of the statute then --

4 THE COURT: I will just issue a judgment and  
5 find the judgment and it will have to go up to the  
6 Court of Appeals.

7 MR. SILVERBERG: I assume there will be reason-  
8 able time for us to go to the Court of Appeals before  
9 the date for the enforcement of the summons.

10 THE COURT: I will give you two days. I suggest  
11 you make up two judgments, one the judgment and one  
12 another stay and agreement so I can sign either or  
13 both.

14 MR. TJADEN: Your Honor, the Government's  
15 position is that this is a summary proceeding. Would  
16 an order be sufficient?

17 THE COURT: Whatever you believe is appropriate  
18 and counsel for respondent believes is appropriate.  
19 Just get an appealable paper that terminates the  
20 case.

21 Thank you.

22 \* \* \*

## I N D E X

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## WITNESS

DIRECT

CROSS

Gerald L. Kaufman

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Howard Levitt

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## EXHIBITS

DEFENDANT'S

DESCRIPTION

FOR  
IDENT.IN  
EVID.

1

Business certificate

4

## United States District Court

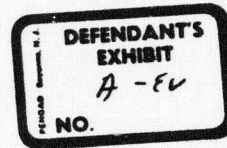
FOR THE  
Eastern District of New York

United States of America and  
Francis T. Brady, etc.,  
Petitioners,  
vs.  
B & E Paving Company and  
Joseph Bartone, etc.,  
Respondents.

To  
Francis T. Brady,  
Special Agent of the Internal  
Revenue Service

CIVIL ACTION FILE NO.

No.



YOU ARE HEREBY COMMANDED to appear in the United States District Court for the  
Eastern District of New York  
at 225 Cadman Plaza East in the city of Brooklyn, New York on  
the 9th day of January 1976 at 9:30 o'clock A.M. to  
testify on behalf of Joseph Bartone (as a hostile witness)

in the above entitled action and bring with you

Any and all documents, reports, correspondence and communications in  
respect of the criminal liability of or recommendation for criminal  
prosecution of Joseph Bartone, Respondent, in connection with Income  
Tax liabilities of said Respondent for the year 1972..

January 6, 1976

Bandler & Kass, Esqs.  
Attorney for Respondent Joseph Bartone  
605 Third Avenue  
Address  
New York, New York 10016

LEWIS ORGEI

Clerk.

By

Deputy Clerk.

RETURN ON SERVICE

Received this subpoena at 605 Third Avenue, NYC at 1:10 PM on January 7, 1976.  
and on January 7, 1976 at 1:13 PM  
served it on the within named FRANCIS T. BRADY  
by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage  
allowed by law.<sup>1</sup>

Dated:

January 7, 1976

Service Fees

Travel \$ 3.02

Services 10.00

Total \$ 13.02

Subscribed and sworn to before me, a Notary Public, this 17th  
day of January, 1976

By

<sup>1</sup> Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or  
agency thereof. 28 USC 1825.

NOTE.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

# Business Certificate for Partners

The undersigned do hereby certify that they are conducting or transacting business as members of a partnership under the name or designation of

B. & E. Paving Co.  
at 144-48 71st Ave., Flushing, N.Y.

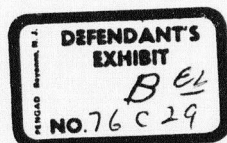
in the County of Queens, State of New York, and do further certify that the full names of all the persons conducting or transacting such partnership including the full names of all the partners with the residence address of each such person, and the age of any who may be infants, are as follows:

NAME Specify which are infants and state ages.	RESIDENCE
Henry Deposito	144-48 71st Ave., Flushing, N.Y.
Joseph Bartone	141-15 Union Tpce., Flushing, N.Y.

WE DO FURTHER CERTIFY that we are the successors in interest to  
the person or persons heretofore using such name or names to carry on or conduct or transact business.

In Witness Whereof. We have this 14th day of May, 1971, made  
and signed this certificate.

*Joseph Bartone*  
*Henry Deposito*



STATE OF NEW YORK  
COUNTY OF QUEENS

On this 14th day of May

, 19 71, before me personally appeared

Henry Deposito and Joseph Bartone

to me known and known to me to be the individual described in, and who executed the foregoing certificate, and he thereupon duly acknowledged to me that he executed the same.

*Martin E. Weingold*

MARTIN E. WEINGOLD  
NOTARY PUBLIC, State of New York  
No. 41-957115 - Queens County  
Term Expires March 30, 1972